AND BRIEFS

No. 16-5294

IN THE

Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 15, 2016
CERTIORARI GRANTED JANUARY 13, 2017

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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, NO. 2013-13906

Date Filed	Docket Text
	***
10/07/2013	USDC order denying COA as to Appellant James McWilliams was filed on 10/07/2013. Docket Entry 105.
	***
10/25/2013	*MOTION for certificate of appealability filed by James McWilliams. Opposition to Motion is Unknown. [7008140-1] (ECF: William Montross)*
	***
12/16/2013	ORDER: Motion for certificate of appealability filed by Appellant James McWilliams is GRANTED in part and DENIED in part. [7008140-2] CRW
	***
02/26/2014	Appellant's brief filed by James McWilliams. Service date: 02/26/2014 [13-

13906] Attorney for Appellant: Montross - email; Attorney for Appellant: Singleton - email; Attorney for Appellee: Crenshaw - email; Attorney for Appellee: Johnson - email. (ECF: William Montross)

***

05/20/2014 Appellee's Brief filed by Appellees Attorney General, State of Alabama, Commissioner, Alabama Department of Corrections and Holman CF Warden.-- [Edited 05/20/2014 by JSC] (ECF: Henry Johnson)

06/02/2014 Reply Brief filed by Appellant James McWilliams. (ECF: William Montross)

***

06/04/2014 Oral argument scheduled. Argument Date: Wednesday, 07/23/2014 at 2:00 p.m. Argument Location: Atlanta Courtroom: Atlanta 339.

07/23/2014 Oral argument held. Oral Argument participants were William Montross, Jr. for Appellant James McWilliams, Palmer Singleton (present but did not argue) for Appellant James McWilliams and Henry M. Johnson for Appellees Attorney General, State of Alabama, Commissioner,

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Alabama Department of Corrections and Holman CF Warden.

***

12/16/2015	Opinion issued by court as to Appellant James McWilliams. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions.
12/16/2015	Judgment entered as to Appellant James McWilliams.
01/05/2016	Petition for rehearing en banc (with panel rehearing) filed by Appellant James McWilliams. (ECF: Palmer Singleton)

***

02/16/2016	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellant James McWilliams are DENIED. [7699416-1]

***

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02/24/2016	Mandate issued as to Appellant James McWilliams.
03/28/2016	Extension for filing certiorari GRANTED until July 15, 2016, by U.S. Supreme Court as to Appellant James McWilliams.
07/20/2016	Notice of Writ of Certiorari filed as to Appellant James McWilliams. SC# 16-5294.

***

01/13/2017	Writ of Certiorari filed as to Appellant James McWilliams is GRANTED. SC# 16-5294.

****

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (WESTERN) CIVIL DOCKET FOR CASE #: 7:04-CV-02923-RDP

Date Filed	#	Docket Text
10/06/2004	1	PETITION for Writ of Habeas Corpus filed (referred to Magistrate-Judge Robert R. Armstrong Jr) (BST) (Entered: 10/07/2004)
		***
12/17/2004	10	ANSWER to petition for writ of habeas corpus by Respondents'.(KSS,) (Entered: 12/17/2004)
12/17/2004	11	Brief on the ground for relief presented in petition for writ of habeas corpus filed by Respondents'. (KSS,) (Entered: 12/17/2004)
12/17/2004	12	Habeas Corpus Checklist by Respondents' re 10 Answer to Complaint (exhibits bounded separately in 3 boxes.) (KSS,) (Entered: 12/17/2004)
		***

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02/07/2005	16	REPLY Brief filed by Petitioner James. McWilliams re: 10 Answer to Complaint filed by James. McWilliams. (Strickland, Stephen) (Entered: 02/07/2005)

***

02/01/2008	55	REPORT AND RECOMMENDATION the mag judge recommends that the petition for writ of habeas corpus and his requests for an evidentiary hearing be DENIED, the parties have until 2/15/2008 to file objections. Signed by Judge R David Proctor on 2/1/2008. (KSS,) (Entered: 02/01/2008)

***

02/25/2008	57	OBJECTION to 55 Report and Recommendations *Petitioner's Objections To The Magistrate's Report and Recommendation* by James. McWilliams. (Strickland, Stephen) (Entered: 02/25/2008)

***

12/01/2008	63	FINAL OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATIONS filed by James McWilliams. (Strickland,

Stephen) Modified on 12/1/2008 (KSS,). (Entered: 12/01/2008)

***

08/25/2010	75	MEMORANDUM OPINION. Signed by Judge R David Proctor on 8/25/2010. (AVC) (Entered: 08/25/2010)
08/25/2010	76	ORDER OF DISMISSAL-In accordance with the Memorandum Opinion entered contemporaneously herewith, the petition for a writ of habeas corpus is hereby DISMISSED with prejudice. Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the court DENIES a certificate of appealability. Costs are taxed to Petitioner. Signed by Judge R David Proctor on 8/25/2010. (AVC) (Entered: 08/25/2010)
09/24/2010	77	NOTICE OF APPEAL by James. McWilliams. (Strickland, Stephen) (Entered: 09/24/2010)

***

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01/03/2011	80	ORDER of USCA as to 77 Notice of Appeal. Petitioner's Motion for Substitution of Counsel and Leave to file an Amended or Supplemental Application for Certificate of Appealability is GRANTED. Signed by USCJ Charles R. Wilson. (AVC) (Entered: 01/04/2011)
12/01/2011	81	ORDER of USCA as to 77 Notice of Appeal. Before Edmondson, Barkett, and Wilson, Circuit Judges. The court GRANTS a certificate of appealability on the issue futher set out in this order. Per curiam opinion attached. (AVC) (Entered: 12/01/2011)
	***	
09/10/2012	83	ORDER of USCA as to 77 Notice of Appeal. The appeal is VACATED and REMANDED to the District Court. Before Dubina, Chief Judge, and Barkett and Wilson, Circuit Judges. (AVC) (Entered: 09/10/2012)
	***	
04/17/2013	96	MEMORANDUM OPINION. Signed by Judge R David Proctor on 4/17/13. (KGE,) (Entered: 04/17/2013)

04/17/2013	97	ORDER ADOPTING REPORT AND RECOMMENDATIONS as set out. Signed by Judge R David Proctor on 4/17/13. (KGE,) (Entered: 04/17/2013)
05/13/2013	98	MOTION to Alter Judgment *Pursuant to Fed. R. Civ. P. 59(e)* by James. McWilliams. (Montross, William) (Entered: 05/13/2013)
07/24/2013	99	ORDER ON RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT-The motion 98 is DENIED. Signed by Judge R David Proctor on 7/24/2013. (AVC) (Entered: 07/24/2013)
08/14/2013	100	MOTION for Certificate of Appealability by James. McWilliams. (Montross, William) (Entered: 08/14/2013)

***

02/24/2016	109	USCA JUDGMENT as to 101 Notice of Appeal. Before Tjoflat, Wilson, and Jordan, Circuit Judges affirming the decision of the District Court. Issued as mandate on 2/24/2016 with per curiam opinion attached. (Attachments: # 1 usca opinion)(AVC) (Entered: 02/26/2016)

****

Appendix A

COURT OF CRIMINAL APPEALS
FORMAL DOCKET SHEET
CRIMINAL APPEALS NO. 6 DIV. 190

RECORD ON APPEAL FILED:	1/26/89 (8 Vols)
CERT. OF COMP. DATE:	1/26/89
Supplemental Record:	2/3/89
Supplemental Record:	4/18/89
Briefs:	
Brief filed:	10/31/90
Reply Brief filed:	2/22/91
Brief on return to remand filed:	6/16/94
Brief filed:	1/18/91
Supplemental Brief Filed:	4/25/91
7-day extension to:	7/14/94
Brief unremanded filed:	7/14/94

Date Filed	**Docket Text**
	***
05/7/1991	ARGUED AND SUBMITTED (E)
	***
08/23/1991	AFFIRMED. OPINION ISSUED.
09/06/1991	Application of Rehearing filed by Mr. Loewy. 7 days allowed for filing brief

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09/13/1991	Brief in support of application for rehearing filed.
05/01/1992	APPLICATION FOR REHEARING OVERRULED.
05/11/1992	Petition for Certiorari filed in Alabama Supreme Court.
01/29/1993	The Court of Criminal Appeals is affirmed as to conviction; case remanded with instructions as to sentence.
	***
03/04/1994	AFFIRMED AS TO CONVICTION, REMANDED WITH INSTRUCTIONS AS TO SENTENCE. OPINION ISSUED.
	***
09/09/1994	AFFIRMED (on return to remand). OPINION ISSUED.
	***
03/03/1995	APPLICATION FOR REHEARING OVERRULED.
03/20/1995	Petition for Certiorari filed in Alabama Supreme Court. (LATE)

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03/23/1995	Writ granted by Alabama Supreme Court.
05/12/1995	The Court of Criminal Appeals is affirmed by Alabama Supreme Court.
07/21/1995	Application for rehearing overruled by Alabama Supreme Court.
08/08/1995	Certificate of Judgment issued by Alabama Supreme Court.
08/08/1995	Certificate of Judgment Issued by the Court of Criminal Appeals

****

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ORDER 1440-1441

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PETITION FOR INQUISITION UPON
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WITH ATTACHED ORDER FOR
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ORDER [AS TO MEDICAL RECORDS] 1564-1565

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PETITION TO HOLD IN CONTEMPT FOR FAILURE TO PRODUCE DOCUMENTS 1571-1572

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VERDICT [PENALTY] 1596

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ORDER [AS TO PRISON RECORDS] 1613

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ORDER [AS TO PRISON RECORDS] 1616-1617

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APPENDIX B — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 16, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13906-P

JAMES MCWILLIAMS,

Petitioner-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, WARDEN, HOLMAN CORRECTIONAL FACILITY, ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING *EN BANC*

BEFORE: TJOFLAT, WILSON and JORDAN, Circuit Judges.

PER CURIAM:

Appendix B

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing *En Banc* are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED DECEMBER 16, 2015

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13906
D.C. Docket No. 7:04-cv-02923-RDP

JAMES E. MCWILLIAMS,

Petitioner-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(December 16, 2015)

Before TJOFLAT, WILSON, and JORDAN, Circuit Judges.

PER CURIAM:

James Edmund McWilliams, Jr., an inmate on Alabama's death row, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his death sentence.

We granted McWilliams a Certificate of Appealability (COA) on four issues: (1) whether the district court erred in holding the state court was not objectively unreasonable in determining McWilliams failed to show a violation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); (2) whether McWilliams is procedurally barred from arguing the trial court violated his Sixth Amendment rights by denying him a continuance for his sentencing hearing; (3) whether the district court erred in finding the state court was not objectively unreasonable in ruling McWilliams received effective assistance of counsel during the penalty phase of his trial and sentencing; and (4) whether the district court erred in determining the state court was not objectively unreasonable in holding McWilliams's rights under *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) were not violated.

We hold that the state court did not commit reversible error under 28 U.S.C. § 2254(d) in denying McWilliams's *Ake* claim, his claim of ineffective assistance of counsel during the penalty phase of trial and sentencing, and his *Griffin* claim. We also hold that McWilliams is procedurally barred from arguing the trial court violated his Sixth Amendment rights in denying his motion for continuance. Accordingly, we affirm.

I. BACKGROUND

On December 30, 1984, McWilliams entered a convenience store in Tuscaloosa, Alabama, where Patricia Reynolds was working the nightshift by herself.

McWilliams locked the doors behind him and proceeded to rob and brutally rape Ms. Reynolds. When he was finished, he shot her with a .38 caliber handgun. Ms. Reynolds died in surgery that night.

McWilliams was arrested driving a stolen car in Ohio with the murder weapon in his possession soon afterwards. He was identified by eyewitnesses who placed him at the scene. While in jail in Ohio, McWilliams bragged to other inmates that he robbed, raped, and killed a woman in Alabama.

In the months leading up to the murder, McWilliams was voluntarily attending mental health counseling in the form of couple's therapy with his pregnant wife at the office of Dr. Sherril Rhodes.[1] After meeting with McWilliams, Dr. Rhodes documented in a report that "there are deeper psychological problems that [McWilliams] is avoiding and hopefully the testing will reveal this." She also suspected the presence of "psychosis, or possibly manic-depressive disorder." Dr. Rhodes then set up an appointment for McWilliams to undergo psychological testing with Dr. Marci K. Davis,[2] a clinical psychologist, on October 15, 1984.

Dr. Davis administered the Minnesota Multiphasic Personality Inventory (MMPI) to McWilliams and

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1. Dr. Rhodes's reports and notes were introduced into evidence during the Rule 32 hearing.

2. Dr. Davis's reports were entered into evidence during the penalty phase.

concluded that McWilliams's MMPI test scores "on the surface indicate that the results are invalid due to faking bad." However, on closer examination, she then determined that "[McWilliams] did tell the truth and took the test in good faith . . . [c]onsequently, we may assume that he is extremely disturbed, has much internal anxiety, and we would expect to find serious pathology." Dr. Davis also recommended McWilliams be admitted to an inpatient treatment facility, evaluated by a psychiatrist for medication, and carefully monitored by counselors. Dr. Davis ended the report by warning other counselors not to meet with McWilliams alone after dark. Nonetheless, McWilliams did not return to counseling before murdering Ms. Reynolds two and a half months later.

A. The Lunacy Commission

McWilliams's mental health has been frequently contested and repeatedly examined throughout the long history of his case, but the central cause for most of the speculation stems from McWilliams's tendency to malinger, or fake symptoms of his alleged mental illness.

McWilliams's counsel began investigating McWilliams's mental health less than a month after he was arrested for murdering Ms. Reynolds. On January 21, 1986, counsel petitioned the Circuit Court of Tuscaloosa County to provide a psychiatric assessment of McWilliams, including an evaluation of his sanity, his competency, and any mitigating circumstances.[3] The court granted the

3. The petition is known as a "Petition for Inquisition Upon Alleged Insane Prisoner."

petition and ordered the State of Alabama (State) to create a "Lunacy Commission" to evaluate McWilliams's mental health at the Taylor Hardin Secure Medical Facility (Taylor Hardin). The Lunacy Commission reported directly to the court.

On June 4, 1986, the Lunacy Commission presented the court with a three-and-a-half-page report summarizing the conclusions of three doctors serving on the Commission.[4] All three doctors concluded McWilliams was competent to stand trial, free of mental illness at the time of the crime, and faking psychotic symptoms.

B. Trial and Penalty Phase

On August 27, 1986, the jury found McWilliams guilty of murder during robbery in the first degree and murder during rape in the first degree. The penalty phase took place the following day. Counsel's strategy during the penalty phase was to present McWilliams as a man who grew up with significant psychological problems that affected his behavior. Although counsel subpoenaed Dr. Rhodes to testify during the penalty phase, Dr. Rhodes did not respond to the subpoena. Ultimately, only McWilliams and his mother testified for the defense. McWilliams and his mother testified that McWilliams had head injuries as a child and a history of blacking out, hallucinating, chronic headaches, doctor visits, and memory problems. Prior to

4. Four doctors appear in the report, including Dr. Norman G. Poythress, the Director of Clinical Services at Taylor Hardin. Dr. Poythress did not summarize his own medical conclusions but did ultimately sign the report on May 27, 1986.

this testimony, counsel was unaware of these injuries and conditions.

McWilliams was permitted to read Dr. Davis's report and her MMPI test results into the record and explain his mental health issues to the jury. The court also admitted Dr. Davis's report into evidence. However, McWilliams was unable to explain any technical aspects of the report, and when cross-examined, he told the prosecutor that he was not a psychologist. The State then presented two mental health experts from the Lunacy Commission, who each testified that McWilliams was faking psychotic symptoms and was not mentally ill. The jury voted 10 to 2 in favor of the death sentence.

C. Sentencing Hearing

On September 3, 1986, counsel filed a motion requesting that McWilliams undergo neuropsychological testing for possible organic brain damage, based on the information revealed during the penalty phase about his head injuries. The court granted the request, ordering the Alabama Department of Corrections (DOC) to perform complete neurological and neuropsychological testing on McWilliams. The court further instructed the DOC to send all results and evaluations to the court no later than September 25, 1986.

On September 22, 1986, Dr. Paul Bivens, a psychologist employed by the DOC, wrote the court, explaining that he completed some of the neuropsychological testing, which indicated "possible organic impairment," but was unable

to complete all the neuropsychological tests. Instead, Dr. Bivens recommended more testing and advised the court to find a clinical neuropsychological specialist who could perform the tests independent of the DOC to "avoid unnecessary conflict."

On September 30, 1986, the trial court appointed Dr. John R. Goff, a specialist in clinical neuropsychology and the Chief of Psychology at Bryce Hospital. Dr. Goff met with McWilliams on October 3, 1986, and performed the neuropsychological testing requested by counsel. Dr. Goff's completed neuropsychological assessment was delivered to all the parties approximately 48 hours before the sentencing hearing.

Dr. Goff's report was approximately five pages long. He determined that McWilliams was suffering from organic brain dysfunction and that "organic personality disorder should be considered." His report also indicated evidence of malingering but noted it was potentially consistent with a "cry for help posture" or possibly a "fake bad." The report further explained there were some "genuine neuropsychological problems," and Dr. Goff diagnosed McWilliams with "organic personality syndrome."

Counsel subpoenaed McWilliams's medical and psychiatric records multiple times before the penalty phase and well in advance of the sentencing hearing. But, the DOC and Taylor Hardin failed to fully comply with the subpoena until the day of the sentencing hearing. The last of the medical and psychiatric records subpoenaed by counsel arrived at the court on October 8 and October 9, 1986—the morning of the 10 a.m. sentencing hearing.

At the sentencing hearing, counsel moved for a continuance to review the newly arrived records with the assistance of an expert. The court denied the request but invited counsel to review the records at the clerk's office during a brief recess. When the hearing resumed at 2 p.m., the court admitted Dr. Goff's report and all the new records into evidence. Counsel again asked for a continuance. The court again denied the request.

The court found three aggravating circumstances in support of McWilliams's death sentence: (1) McWilliams was previously convicted of a felony involving the use of violence to the person, specifically a robbery and rape he was convicted of on June 26, 1985; (2) the murder was committed during the course of a robbery and rape; and (3) the murder was especially heinous, atrocious, or cruel compared to other capital offenses in light of the brutality of the rape, the execution-type slaying, and McWilliams's behavior after the crime. The court found no mitigating circumstances.

The court determined that "the [d]efendant is not psychotic, either from organic brain dysfunction or any other reason." The court did find that "the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that does not rise to the level of a mitigating circumstance" and by "a preponderance of the evidence . . . the defendant [is] feigning, faking, and manipulative." The court then sentenced McWilliams to death by electrocution.

D. Rule 32 Evidentiary Hearing

On April 2, 1997, McWilliams challenged his conviction in a petition under Rule 32 of the Alabama Rules of Criminal Procedure, claiming that his counsel was ineffective for failing to investigate and present mitigating evidence at his penalty phase and sentencing. On June 12, 2000, the Alabama circuit court conducted a four-day evidentiary hearing. In September 2001, the Alabama circuit court denied the petition. In 2004, the Alabama Court of Criminal Appeals reviewed and affirmed the decision.

The Rule 32 evidentiary hearing on McWilliams's post-conviction claims included the testimony of defense expert Dr. George Woods and the State's rebuttal expert, Dr. Karl Kirkland. Dr. Woods reviewed the MMPI performed by Dr. Davis that McWilliams read to the jury during the penalty phase. Dr. Woods explained the test could be confused with exaggerated scores but actually indicated McWilliams had significant psychiatric and psychological problems, including paranoia and mania, as well as "abundant evidence of psychopathology." Dr. Woods agreed with Dr. Davis that McWilliams took the MMPI in good faith. Dr. Woods also examined the 1986 MMPI testing performed at Taylor Hardin, which the State used during the penalty phase. He explained that the results indicated a cry for help with severe psychopathology and did not necessarily mean McWilliams faked his symptoms.

Dr. Woods also reviewed Dr. Goff's report and testified that the results revealed symptoms of a psychiatric

disorder, but because neuropsychological impairments change over time, McWilliams's neuropsychological function was somewhat restored as of 2000. Dr. Woods further testified that he reviewed the DOC records, and the records revealed McWilliams was medicated with antipsychotics and antidepressants throughout his entire incarceration. Dr. Woods stated that, in examining the DOC records, the administration of medication was consistent with the presentation of symptoms that required psychiatric treatment.

Dr. Woods ultimately diagnosed McWilliams with bipolar disorder, with symptoms of mania, hypomania, and depression. Dr. Woods also concluded that McWilliams was suffering from bipolar disorder on the night of the crime. Dr. Karl Kirkland, a forensic psychologist, testified that he disagreed with Dr. Woods's diagnosis. Dr. Kirkland agreed with the evaluation of the Taylor Hardin doctors that McWilliams was feigning psychiatric symptoms and that his behavior was more appropriately categorized as a character disorder.

II. PROCEDURAL HISTORY

McWilliams's conviction and death sentence were affirmed on direct appeal by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. *See McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), *aff'd in part, remanded in part sub nom., Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993), *on remand to sub nom., McWilliams v. State*, 640 So. 2d 1025 (Ala. Crim. App. 1994), *opinion after remand*, 666 So. 2d 89 (Ala.

Crim. App. 1994), *aff'd sub nom., Ex part McWilliams*, 666 So. 2d 90 (Ala. 1995), *cert. denied sub nom., McWilliams v. Alabama*, 516 U.S. 1053, 116 S. Ct. 723, 133 L. Ed. 2d 675 (1996).

The Alabama circuit court entered its final order denying McWilliams's Rule 32 petition in September 2001, and the Alabama Court of Criminal Appeals affirmed the denial. *See McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004). On September 24, 2004, the Alabama Supreme Court denied McWilliams's petition for a writ of certiorari on his Rule 32 petition.

McWilliams then turned to the federal courts. On October 6, 2004, he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama. The district court assigned a magistrate judge to review McWilliams's petition and submit a recommendation. On February 1, 2008, the magistrate judge issued a report and recommendation denying all of McWilliams's claims. On August 25, 2010, the district court entered a memorandum opinion adopting the magistrate judge's conclusions. The district court further addressed specific objections McWilliams raised to the magistrate judge's report and recommendation and then entered an order dismissing McWilliams's habeas petition with prejudice and denying his application for a COA.

This court granted a COA on whether the district court improperly overruled all of McWilliams's objections to the magistrate judge's report and recommendation without specifically acknowledging certain objections.

On September 10, 2012, we vacated the district court's decision and remanded McWilliams's case to the district court with instructions to resolve all the claims in his habeas petition. The district court then entered a memorandum opinion on April 17, 2013 overruling all of McWilliams's objections to the magistrate judge's report, adopting the report in full, and denying McWilliams's habeas petition. On October 7, 2013, the district court again denied McWilliams's request for a COA.

McWilliams then filed an application for a COA in this court. On December 16, 2013, we granted McWilliams a COA.

III. STANDARD OF REVIEW

"When examining a district court's denial of a . . . habeas petition, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error." *Connor v. Sec'y, Fla. Dep't of Corr.*, 713 F.3d 609, 620 (11th Cir. 2013) (internal quotation marks omitted).

"Because [McWilliams] filed his federal petition after April 24, 1996, this case is governed by 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death [Penalty] Act of 1996 (AEDPA)." *See Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1345 (11th Cir. 2011). When a state court has denied a claim on the merits, "the standard a petitioner must meet to obtain federal habeas relief was intended to be, and is, a difficult one." *See Johnson v. Sec'y, DOC*, 643 F.3d 907, 910 (11th Cir. 2011) (citing *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011)).

The "purpose of AEDPA's" amendments to § 2254 "is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 565 U.S. __, __, 132 S. Ct. 38, 43-44, 181 L. Ed. 2d 336 (2011) (internal quotation marks omitted). Therefore, federal review of final state court decisions under § 2254 is "greatly circumscribed" and "highly deferential." *See Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc) (internal quotation marks omitted). AEDPA only allows federal courts to grant relief for habeas claims decided by a state court on the merits if the state court's resolution of the claims:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.

28 U.S.C. § 2254(d).

Under AEDPA, "the state court's application of governing [F]ederal law . . . must be shown to be not only erroneous, but objectively unreasonable." *Waddington v. Sarausad*, 555 U.S. 179, 190, 129 S. Ct. 823, 831, 172 L. Ed. 2d 532 (2009) (internal quotation marks omitted); *see also Williams v. Taylor*, 529 U.S. 362,

410-11, 120 S. Ct. 1495, 1522, 146 L. Ed. 2d 389 (2000) ("[A]n *unreasonable* application of [F]ederal law is different from an *incorrect* application of [F]ederal law."). This is a "substantially higher threshold" than when only a showing of erroneousness is required. *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 1939, 167 L. Ed. 2d 836 (2007). When assessing the state court's decision, we must consider the record the court had before it. *Cullen v. Pinholster*, 563 U.S. 170, 184, 131 S. Ct. 1388, 1400, 179 L. Ed. 2d 557 (2011). It is the petitioner's burden to demonstrate that the state court applied the relevant clearly established law to that record "in an objectively unreasonable manner." *See Woodford v. Visciotti*, 537 U.S. 19, 25, 123 S. Ct. 357, 360, 154 L. Ed. 2d 279 (2002) (per curiam). Given this determination is objective, a federal court may not issue a writ of habeas corpus simply because "it concludes in its independent judgment" that the state court was incorrect. *See Williams*, 529 U.S. at 409-11, 120 S. Ct. at 1522.

Our review of a petitioner's claim is further limited under § 2254(e)(1) by "a presumption of correctness [that] applies to the factual findings made by state trial and appellate courts." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011) (internal quotation marks omitted). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." *Id.* (internal quotation mark omitted). "Instead, it must conclude that the state court's findings lacked even fair support in the record." *Id.* (internal quotation mark omitted). The petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

IV. DISCUSSION

A. Alabama's Application of *Ake*

McWilliams contends the State deprived him of due process under *Ake* because the State did not provide him the meaningful assistance of an independent psychiatric expert at his sentencing hearing.

Under *Ake*, "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the [s]tate must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. This right "extends to the sentencing phase of a criminal case." *Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211, 1223 (11th Cir. 2012) (internal quotation marks omitted). However, *Ake* cautions that a defendant does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. Rather, *Ake* entitles the defendant access to a "competent psychiatrist." *Id.* "[T]he decision on how to implement this right" is left "to the [s]tate." *Id.*

McWilliams first argues that he was denied the assistance contemplated by *Ake* because he was not provided an "expert of his own." Specifically, McWilliams asserts that he was denied such an expert because Dr. Goff's assistance was "equally disseminated to all parties." The State contends there is no clearly established Federal

law that requires it to provide a partisan mental health expert to the defense and, therefore, McWilliams is not entitled to federal habeas relief on this basis.

In some jurisdictions, a court-appointed neutral mental health expert made available to all parties may satisfy *Ake*. *See Miller v. Colson*, 694 F.3d 691, 697-99 (6th Cir. 2012) (discussing the split amongst Sixth Circuit decisions that address whether a neutral mental health expert satisfies *Ake*), *cert. denied*; *Granviel v. Lynaugh*, 881 F.2d 185, 191-92 (5th Cir. 1989) (holding that *Ake* is met when the government provides a defendant with neutral psychiatric assistance), *cert. denied*. Other circuits have held that the state must provide a non-neutral mental health expert to satisfy *Ake*. *See United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (holding that a defendant is entitled to independent, non-neutral psychiatric assistance); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990) ("[U]nder *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process."). However, the United States Supreme Court has thus far declined to resolve this disagreement among the circuits. *See Miller*, 694 F.3d at 697 n. 6; *Granviel v. Texas*, 495 U.S. 963, 110 S. Ct. 2577, 109 L. Ed. 2d 758 (1990) (denying certiorari). As a result, the State's provision of a neutral psychologist would not be "contrary to, or involve[] an unreasonable application of, clearly established Federal law." *See* 28 U.S.C. § 2254(d)(1). Therefore, McWilliams's argument fails.

McWilliams next contends that Dr. Goff's late arrival to the proceedings denied him due process under *Ake*. The

State asserts a defendant is only entitled to assistance from a psychiatrist under *Ake* and the trial court's appointment of Dr. Goff satisfied this requirement.

McWilliams was entitled access to a "competent psychiatrist" to assist him in the development of his defense. *See Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. The State appointed Dr. Goff to examine McWilliams and produce a report. Nothing in the record suggests that Dr. Goff lacked the requisite expertise to examine McWilliams and generate a report. While Dr. Goff provided the report to McWilliams only a few days before the sentencing hearing, McWilliams could have called Dr. Goff as a witness or contacted him prior to the completion of the report to ask for additional assistance. McWilliams's failure to do so does not render Dr. Goff's assistance deficient. Moreover, the report was admitted into evidence and considered by the court at sentencing, demonstrating the defense utilized Dr. Goff's assistance. Thus, the State provided McWilliams access to a competent psychiatrist, and McWilliams relied on the psychiatrist's assistance.

Given the deference owed to the state court, its determination that *Ake* was satisfied under these circumstances was not objectively unreasonable. Therefore, we hold that the State's adjudication of McWilliams's *Ake* claim was not contrary to or an unreasonable application of clearly established Federal law.

Even assuming an *Ake* error occurred, relief may only be granted if the error had a "substantial and injurious effect or influence" on the outcome of McWilliams's

case. *See Hicks v. Head*, 333 F.3d 1280, 1286-87 (11th Cir. 2003) (internal quotation marks omitted). The jury at McWilliams's penalty phase voted 10 to 2 in favor of the death penalty. The trial judge reviewed Dr. Goff's report and took into account the possibility of organic brain damage but also noted that, throughout McWilliams's medical records, different psychologists and psychiatrists describe him as a malingerer. For example, the mental health professionals on the Lunacy Commission determined McWilliams was a malingerer and a faker; Dr. Goff's report indicated that McWilliams was malingering on some level; Dr. Kirkland determined McWilliams was faking symptoms; and even Dr. Woods, McWilliams's post-conviction expert admitted McWilliams has a history of malingering and can be deceitful and manipulative. Moreover, Dr. Woods was the only doctor who diagnosed McWilliams as bipolar—a diagnosis contested by Dr. Kirkland. Based on a review of this and other evidence, the trial judge found that McWilliams's "aggravating circumstances overwhelmingly outweighed the mitigating circumstances."

A few additional days to review Dr. Goff's findings would not have somehow allowed the defense to overcome the mountain of evidence undercutting his claims that he suffered from mental illness during the time of the crime. Accordingly, even assuming the state court committed an *Ake* error, the error did not have a substantial and injurious effect on McWilliams's sentence.

B. Procedural Default

McWilliams argued to the district court that he was denied his Sixth Amendment right to effective assistance of counsel when the trial court refused his motion for continuance of the sentencing hearing. However, the magistrate judge determined McWilliams did not properly raise this claim before the Alabama Supreme Court and, in turn, McWilliams failed to exhaust his state remedies. Therefore, the district court determined this claim is procedurally barred.

When a habeas claim arises in state court, the petitioner must exhaust his state remedies. 28 U.S.C. § 2254(b)(1)(A). In order to satisfy the exhaustion requirement, a petitioner must "fairly presen[t] federal claims to the state courts in order to give the [s]tate the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865 (1995) (per curiam) (internal quotation marks omitted). The petitioner must apprise the state court of "the federal constitutional issue," not just the underlying facts of the claim or a "somewhat similar state-law claim." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) (internal quotation marks omitted). The Supreme Court has observed that "Congress surely meant that exhaustion be serious and meaningful." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10, 112 S. Ct. 1715, 1720, 118 L. Ed. 2d 318 (1992). The Court further explained:

> [c]omity concerns dictate that the requirement of exhaustion is not satisfied by the mere

> statement of a federal claim in state court. Just as the [s]tate must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the [s]tate a full and fair opportunity to address and resolve the claim on the merits.

Id.; *see also Henderson v. Campbell*, 353 F.3d 880, 898 n. 25 (11th Cir. 2003).

McWilliams first raised his ineffective assistance of counsel claim based on the motion for continuance in his direct appeal to the Alabama Court of Criminal Appeals. The court denied this claim because McWilliams "demonstrated no prejudice." *McWilliams v. State*, 640 So. 2d 982, 993 (Ala. Crim. App. 1991). McWilliams then petitioned the Alabama Supreme Court for a writ of certiorari. In his petition, McWilliams asserted: (1) his rights were violated "under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution" and (2) the Alabama Court of Criminal Appeals erred by holding he had not demonstrated prejudice. The Alabama Supreme Court declined to review the petition.

McWilliams only mentioned his motion for continuance in Sections VIII and IX of his brief to the Alabama Supreme Court. But, he failed to argue in either of those Sections that the denial of the motion violated his right to effective assistance of counsel. Although Section VIII asserted the trial court abused its discretion in denying McWilliams's motion for continuance, McWilliams did not

allege the denial violated his right to effective assistance of counsel, and he did not mention the phrase "effective assistance of counsel" or cite *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). McWilliams also did not mention *Strickland* or use the phrase "effective assistance of counsel" in Section IX of the brief.

Accordingly, McWilliams did not apprise the state court of his constitutional claim regarding his motion for continuance of the sentencing hearing. The district court did not err in concluding McWilliams's ineffective assistance of counsel claim is procedurally barred.

C. Ineffective Assistance of Counsel During the Penalty Phase of Trial and Sentencing

McWilliams also claims counsel was ineffective for failing to investigate or present mitigating evidence during the penalty phase of his trial and sentencing.

The district court's denial of McWilliams's habeas corpus petition on this issue is reviewed de novo. *See Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010).

As with McWilliams's *Ake* claim, we may only grant habeas relief on this issue if the State's resolution of the Rule 32 proceedings and subsequent appeals resulted in a decision that was either (1) "contrary to or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court

proceedings." 28 U.S.C. § 2254(d). Therefore, in contrast to our review of a *Strickland* claim on direct appeal from a federal district court, we must defer to the state court unless its application of *Strickland* was unreasonable. *See Richter*, 562 U.S. at 101, 131 S. Ct. at 785. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* at 786 (internal quotation marks omitted). Furthermore, as discussed above, we must presume the state court's factual findings to be correct unless the petitioner rebuts this presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

"The object of an ineffectiveness claim is not to grade counsel's performance." *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069; *White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). The issue is "not what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987) (internal quotation marks omitted).

To establish that his counsel provided constitutionally ineffective assistance, McWilliams must show both that "counsel's performance was deficient" and that the deficiency "prejudiced [his] defense." *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Deficient performance is representation that falls "below an objective standard of reasonableness" measured by "prevailing professional

norms." *See id.* at 687-88, 104 S. Ct. at 2064-65. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066. Thus, "to show that counsel's performance was unreasonable, the petitioner must establish that *no competent counsel would have taken the action that his counsel did take.*" *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001).

Given the strong presumption of reasonableness under *Strickland* and the requirements of AEDPA, our review of counsel's performance is "doubly deferential." *See Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009). McWilliams's claim cannot succeed unless he provides affirmative evidence of ineffectiveness—an "absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt v. Titlow*, 571 U.S. __, __,134 S. Ct. 10, 17, 187 L. Ed. 2d 348 (2013) (internal quotation marks omitted).

McWilliams asserts counsel was ineffective because counsel failed to investigate and present evidence of McWilliams's family history and mental health. According to McWilliams, the mitigation evidence presented at his post-conviction hearings shows the evidence counsel offered during trial and sentencing was deficient. But, the Alabama Court of Criminal Appeals determined that counsel diligently investigated and presented evidence about McWilliams's family history and mental health, and this conclusion does not unreasonably contravene clearly established Federal law.

First, counsel spoke to McWilliams's mother, father, and wife about McWilliams's family history. Counsel also telephoned McWilliams's friends. Counsel testified at the Rule 32 evidentiary hearing that he would have investigated any other potentially useful sources of information or individuals mentioned to him as possible mitigation witnesses. Moreover, McWilliams's mother and McWilliams testified extensively about his childhood during the penalty phase.

Second, counsel: (1) requested that McWilliams be evaluated by the Lunacy Commission; (2) retrieved McWilliams's medical records, despite the DOC and Taylor Hardin ignoring his subpoenas; (3) obtained the assistance of a volunteer psychologist, (4) arranged for McWilliams to be evaluated by Dr. Goff, and (5) subpoenaed McWilliams's previous psychologist to testify during the penalty phase. Although the subpoenaed psychologist did not respond to the subpoena, counsel testified at the Rule 32 hearing that he made a strategic decision not to enforce the subpoena because forcing a doctor into court could backfire. Furthermore, although counsel did not learn of the head injuries McWilliams sustained as a child until the penalty phase of trial, the Lunacy Commission reported no evidence of a brain injury. Therefore, it was reasonable for counsel to conclude that McWilliams had no such injuries. Nevertheless, once counsel learned of the head injuries, he immediately moved for and obtained a neuropsychological report prior to the sentencing hearing. At the hearing, the report was admitted into evidence.

In undertaking such efforts, counsel's investigation of McWilliams's family history and mental health was

reasonable. *See Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1241-43 (11th Cir. 2010) (finding that counsel performed an adequate mitigation investigation where he gathered medical records and assisted with the development of an expert evaluation report). In addition, given McWilliams's questionable mental health history and the limited value of his family background information, it cannot be found that "no competent counsel" would have adopted the same approach as counsel. *See Grayson*, 257 F.3d at 1216. While counsel may have been able to present more mitigation evidence, this alone does not render his decision not to do so unreasonable. *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) ("That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.").

On this record, McWilliams has not met his AEDPA burden. He has not shown that counsel's performance was so deficient as to overcome the "doubly deferential" standard required for relief. *See Knowles*, 556 U.S. at 123, 129 S. Ct. at 1420. We therefore reject McWilliams's claim of ineffective assistance of counsel.

D. Prosecutorial Misconduct

Finally, McWilliams alleges the prosecutor's comments during closing argument on his failure to testify at trial violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. McWilliams contends these statements denied him a fair trial because they constituted improper burden-shifting arguments.

McWilliams's claim of prosecutorial misconduct involves mixed questions of law and fact and, therefore, is reviewed de novo. *See United States v. Noriega*, 117 F.3d 1206, 1218 (11th Cir. 1997).

The Fifth and Fourteenth Amendments "forbid[] either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin*, 380 U.S. at 615, 85 S. Ct. at 1233. However, "a prosecutor's indirect reference to a defendant's failure to testify is not reversible error per se." *United States v. Delgado*, 56 F.3d 1357, 1368 (11th Cir. 1995). This court has "strictly enforced the requirement that a defendant show that the allegedly offensive comment was either manifestly intended to be a comment on the defendant's silence or that the comment naturally and necessarily related to the defendant's silence." *Isaacs v. Head*, 300 F.3d 1232, 1270 (11th Cir. 2002). "A comment on the failure of the *defense*, as opposed to that of the *defendant*, to counter or explain the testimony presented or evidence introduced is not [improper burden-shifting]." *Duncan v. Stynchcombe*, 704 F.2d 1213, 1215-16 (11th Cir. 1983) (per curiam).

Appendix C

Prosecutorial misconduct during closing argument, including an inappropriate burden-shifting argument, only warrants a new trial if the remarks were "improper" and "prejudicially affect[ed]" the defendant's "substantial rights." *See United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998) (internal quotation marks omitted), *aff'd*, 37 F. App'x 978 (11th Cir. 2002). "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would be different." *Id.* (alterations in original) (internal quotation marks omitted).

McWilliams challenges the following comment made by the prosecution:

> You know, one thing I do note that neither of the defense attorneys have talked about in the evidence or really dwelt on: they did not talk about that gun in that car right beside the man underneath the armrest, loaded, up in Ohio. And they did not talk about the bullets in his pocket; and they did not talk about the bullets down in the floorboard of the car—the ones he said he was biting on. He said he knew those were there, but he didn't know about the gun being there. Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, and you have not heard an explanation; the evidence doesn't show any other explanation for it.

Appendix C

Ex parte McWilliams, 640 So. 2d 1015, 1018-19 (Ala. 1993).

The Alabama Court of Criminal Appeals found that the prosecutor's comment was not "intended to be a reference to [McWilliams's] silence." *McWilliams*, 640 So. 2d at 1010. Furthermore, the Alabama Supreme Court determined that "[t]his is clearly a comment on the failure of *defense counsel* to explain testimony or evidence." *Ex parte McWilliams*, 640 So. 2d at 1019-20. The prosecutor began his comment by telling the jury he was referring to what the *defense attorneys* did not talk about "in the *evidence*." While the statement, "[t]here is no good reason, explanation that indicates anything other than guilt in this case," by itself could be taken to mean the defendant did not provide an explanation himself, the prosecutor followed the comment by stating that "the evidence doesn't show any other explanation for it." In light of the entire statement, it is clear that the prosecutor intended the statement to be directed at counsel, and the comment naturally and necessarily related to counsel's arguments regarding the evidence introduced at trial, not McWilliams's constitutionally protected silence.

Accordingly, McWilliams has failed to show the state court's "was contrary to or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." *See* 28 U.S.C. § 2254(d).

V. CONCLUSION

For the foregoing reasons, we find as follows. First, the state court did not commit reversible error under 28 U.S.C. § 2254(d) in denying McWilliams's (1) *Ake* claim, (2) his claim of ineffective assistance of counsel during the penalty phase of trial and sentencing, and (3) his claim that the prosecutor improperly commented on his failure to testify. Second, McWilliams's ineffective assistance of counsel claim based on the trial court's denial of his motion for continuance of the sentencing hearing is procedurally defaulted. Therefore, we affirm the district court's denial of McWilliams's petition for a writ of habeas corpus.

AFFIRMED.

Appendix C

JORDAN, Circuit Judge, concurring.

I concur in the judgment denying federal habeas corpus relief to Mr. McWilliams. My reasons are as follows.

• The ineffective assistance of counsel claim based on the denial of the continuance of the sentencing hearing was not exhausted under 28 U.S.C. § 2254(b)(1) because Mr. McWilliams did not present it in his petition for discretionary review to the Alabama Supreme Court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999).

• The ineffective assistance of counsel claim related to the investigation and presentation of mitigating evidence at the penalty phase fails because counsel conducted a competent mental health investigation; had Mr. McWilliams evaluated not once, but twice; and presented mitigating evidence (including Dr. Goff's report) at the sentencing hearing. *See Bobby v. Van Hook*, 558 U.S. 4, 9-12, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009).

• The claim based on a violation of *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), is a close one, as shown by the fact that two judges on the Alabama Court of Criminal Appeals sided with Mr. McWilliams. See *McWilliams v. State*, 640 So.2d 982, 1014 (Ala. Cr. App. 1991) (Bowen, J., dissenting in part). But given AEDPA deference, the finding by the Court of Criminal Appeals that the prosecutor's argument was not a comment on Mr. McWilliams' right to remain silent was a reasonable application of *Griffin*.

• The claim based on *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), is also close, for the reasons outlined in Judge Wilson's dissent. At the end of the day, however, I think the claim fails. First, the Supreme Court has not addressed whether *Ake* is satisfied by the court appointment of a neutral mental health expert. As a result, I cannot say that the Court of Criminal Appeals unreasonably applied, or ruled in a way that was contrary to, *Ake*. *See Woods v. Donald*, 135 S. Ct. 1372, 1377, 191 L. Ed. 2d 464 (2015). Second, I do not think Mr. McWilliams has shown a "substantial and injurious effect" from any *Ake* violation. *See Fry v. Pliler*, 551 U.S. 112, 119-20, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007). I reach this conclusion in part because Mr. McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing. Given this void in the record, it is difficult for me to conclude that Mr. McWilliams has met his burden on prejudice, as we do not know how additional time with Dr. Goff (and his report) would have benefited the defense. My point is not that a capital defendant must always present the testimony of his medical expert at a post-conviction hearing to prove prejudice under *Ake*. It is, instead, that in this case Dr. Goff's absence is one of the reasons that Mr. McWilliams cannot show a "substantial and injurious effect."

Appendix C

WILSON, Circuit Judge, dissenting:

Defendants facing the death penalty—the "gravest sentence our society may impose"—must have "a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. __, __, 134 S. Ct. 1986, 2001, 188 L.Ed.2d 1007 (2014). This means that they must receive "meaningful access to justice" during their capital proceedings. *See Ake v. Oklahoma*, 470 U.S. 68, 76-77, 105 S. Ct. 1087, 1092-1093, 84 L. Ed, 2d 53 (1985). In *Ake*, the Supreme Court held that this guarantee requires states to provide defendants meaningful "access to a psychiatrist[ ]" when their mental health "is likely to be a significant factor" at trial or sentencing. *See id.* at 74-77, 105 S. Ct. at 1091-1093. James Edmund McWilliams, Jr. was denied this basic right.

McWilliams's mitigation case depended on the judge and jury's conclusions about his mental health. Nonetheless, McWilliams did not receive any expert assistance during his sentencing before the jury. And, at his judicial sentencing hearing, he again was denied assistance, absent an expert report provided hours beforehand from a mental health expert who did not have the opportunity to review his full psychiatric history. This was not meaningful assistance. For these reasons, Alabama's resolution of McWilliams's *Ake* claim was "an unreasonable application of clearly established Federal law." 28 U.S.C. § 2254(d)(1). Therefore, I would reverse the district court's denial of McWilliams's habeas petition with directions to remand the case to state court for a new sentencing hearing.

Appendix C

I.

The penalty phase of McWilliams's trial began on August 28, 1986. On that date, a sentencing hearing was held before the jury. Although McWilliams received psychological services in the months leading up to the murder of Patricia Reynolds and his mental health history formed the basis of his mitigation case, the trial court did not provide him access to a psychiatrist during this phase. Moreover, defense counsel subpoenaed Dr. Sherril Rhodes to testify at the hearing, but Dr. Rhodes did not appear. Ultimately, McWilliams and his mother were the only witnesses for the defense during the penalty phase. Meanwhile, the State proffered multiple expert psychiatric witnesses.

McWilliams's judicial sentencing hearing was scheduled for October 9, 1986. On September 30, 1986, the trial court appointed a clinical neuropsychologist, Dr. John R. Goff—a state employee—to examine McWilliams and generate a report. Dr. Goff provided his report to both the prosecution and defense on October 7, 1986. The report stated that McWilliams's "neuropsychological assessment [wa]s reflective of organic brain dysfunction which is localized to the right cerebral hemisphere." It also found there was evidence of "cortical dysfunction attributable to the right cerebral hemisphere dysfunction." The report concluded that "in light of [McWilliams's] obvious neuropsychological deficit, organic personality syndrome should be considered." The next day, on October 8, the court advised defense counsel that it had just received McWilliams's medical and psychiatric Department of Corrections (DOC) records, which counsel had subpoenaed multiple times. However, various records

remained missing. The DOC produced more records on October 9—the day of the sentencing hearing.

Faced with less than 48 hours to review this new information and consider its usefulness, defense counsel sought more time to secure the services of an expert to assist him in evaluating the records. Counsel stated to the court:

> [G]iven the nature of this case . . . it is necessary on my part to have someone else review these findings. . . . [W]e are unable to present anything because of the shortness of time between which this material was supplied to us and the date of the hearing. . . . It is the position of the Defense that we received these records at such a late date, such a late time that it has put us in a position as layman, with regard to psychological matters, that we cannot adequately make a determination as to what to present to The [sic] Court with regards to the particular deficiencies that the Defendant has. . . . [W]e really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance.

Nevertheless, the court denied the Motion for Continuance.

This sequence of events does not constitute the meaningful access to a mental health expert contemplated by *Ake*.

II.

A. An Unreasonable Application of *Ake*

Ake is unequivocal: due process requires states to provide a defendant the access to a psychiatrist necessary to assure him "a fair opportunity to present his defense" and the ability "to participate meaningfully in [his] judicial proceeding[s]." *See Ake*, 470 U.S. at 76-77, 83-84, 105 S. Ct. at 1092-93, 1096-97; *Medina v. California*, 505 U.S. 437, 444-45, 112 S. Ct. 2572, 2577, 120 L. Ed. 2d 353 (1992) ("The holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him a fair opportunity to present his defense and to participate meaningfully in the judicial proceeding." (internal quotation marks omitted)). Accordingly, "[t]he [s]tate must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense*." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096 (emphasis added). This requirement applies to any trial or sentencing proceedings in which the defendant's mental health will be a significant factor.[1] *See id.* at 83-84,

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1. Here, it was clear that McWilliams's mental health was a significant factor in his sentencing proceedings, including both the penalty phase and judicial sentencing hearing. There is no dispute among the parties that McWilliams's rights under *Ake* were triggered for the judicial sentencing hearing. Moreover, at the penalty phase, the trial court was aware of the substantial role that McWilliams's mental health was to play in his case for mitigation—the defense informed the court that it subpoenaed a mental health

105 S. Ct. at 1096-97; *Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211, 1223 (11th Cir. 2012).

Providing further insight into the type of assistance compelled by *Ake*, the *Ake* Court explained the role of the psychiatrist in this context as: (1) gathering facts—through an examination, interviews, and elsewhere—to share with the judge and jury; (2) analyzing the information gathered and rendering conclusions about the defendant's mental condition; (3) assisting the defendant with identifying the probative questions to ask of the prosecution's psychiatrists; (4) assisting the defendant with understanding the opinions proffered by the other party's psychiatrists; and (5) helping lay jurors make a sensible and educated determination about the defendant's mental condition. *See Ake*, 470 U.S. at 80-81, 105 S. Ct. at 1095.

Thus, *Ake* does not simply entitle a criminal defendant to expert assistance; the assistance must be meaningful. McWilliams was denied this right during both the penalty phase and judicial sentencing hearing.

1. As with the Defendant in *Ake*, McWilliams Was Not Provided Any Psychiatric Assistance When He Appeared Before the Jury for Sentencing.

The facts surrounding McWilliams's penalty phase hearing mirror those that resulted in a denial of due

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expert to testify at the penalty phase hearing, and at the hearing, the State offered expert psychiatric testimony, and McWilliams's mother testified about McWilliams's childhood head trauma.

process in *Ake*. After the defendant in *Ake* was found guilty, he appeared before the jury for sentencing. During this proceeding, the prosecution relied on testimony from state psychiatrists who examined the defendant, but the defendant had "no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment." *Id.* at 73, 105 S. Ct. at 1091. The Court held that the defendant was denied due process as a result of the state's failure to provide him access to a psychiatrist at the proceeding. *Id.* at 86-87, 105 S. Ct. at 1098. Likewise, McWilliams appeared before the jury for sentencing—his "penalty phase" hearing—after his verdict was rendered, and the trial court did not provide him any access to a psychiatrist, leaving him with no means to rebut the State's expert testimony. Therefore, as in *Ake*, McWilliams was denied due process when he appeared before the jury for sentencing.

2. The Trial Court Failed to Provide McWilliams Meaningful Assistance at the Judicial Sentencing Hearing.

The trial court's failure during the penalty phase could have been remedied through the provision of meaningful expert assistance for the judicial sentencing hearing. But, the trial court did not provide McWilliams such assistance, thereby denying him due process.

First, Dr. Goff's late arrival to the proceedings rendered any assistance he could provide a nullity, not the meaningful assistance contemplated by *Ake*. This court has previously explained that a psychiatric examination

must be done "at such a time to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985). Dr. Goff was unable to provide assistance to the defense until less than 48 hours before the judicial sentencing hearing—when his report and findings were finally completed. This was an inadequate amount of time for Dr. Goff to educate defense counsel on the report, assist counsel in developing a strategy and testimony for the hearing, and/or help counsel understand and respond to the testimony put forth by the State's expert witnesses at the penalty phase. *See Ake*, 470 U.S. at 80-81, 105 S. Ct. at 1095. In light of the technical nature of the report and McWilliams's complex mental health history, the defense did not even have enough time to achieve the basic level of understanding of the report needed to use it at the hearing. Moreover, in the hours leading up to the hearing, defense counsel had to determine how the newly provided DOC records related to the report's findings. Thus, any assistance received from Dr. Goff's report was superficial and far from meaningful.

Second, Dr. Goff could not provide competent assistance because he did not have the benefit of reviewing critical mental health records. Despite defense counsel's multiple requests to the DOC, the DOC did not produce McWilliams's mental health records until hours before the sentencing hearing—after Dr. Goff's report was completed. These records showed, *inter alia*, that McWilliams was medicated with antipsychotics and antidepressants while incarcerated. Without access to these highly relevant records, Dr. Goff could not have

provided a meaningful analysis.[2] *See Blake*, 758 F.2d at 532-33 (finding the defendant was denied due process because the state did not produce records relevant to his expert psychiatrist's testimony until the day before trial); *Starr v. Lockhart*, 23 F.3d 1280, 1288-89 (8th Cir. 1994) (holding that the defendant was denied due process under *Ake* where the psychiatrist was merely "[un]able to interpret or explain" relevant information, including the results of past mental health examinations).

Third, in order to obtain meaningful assistance from a psychiatrist, the defense must be able to speak freely with the psychiatrist about its case, without the prosecution's access to the discussion. As McWilliams points out in his brief, *Ake* is not satisfied by an expert "who would provide . . . assistance to the defendant, only to cross the aisle and disclose to the State the future cross-examination of defense counsel." However, as a neutral expert, Dr. Goff was free to make such a disclosure.

Relatedly, *Ake* requires that a defendant receive an opportunity—through an independent psychiatrist—to "develop[] his *own* psychiatric evidence to rebut the [State's] evidence and to enhance his defense in mitigation." *Tuggle v. Netherland*, 516 U.S. 10, 13, 116 S. Ct. 283, 285,

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2. Additionally, under these circumstances—where the factfinder is deprived of expert testimony on parts of the defendant's psychiatric history—the factfinder "loses the substantial benefit of potentially probative information," resulting in "a much greater likelihood of an erroneous decision." *See Ford v. Wainwright*, 477 U.S. 399, 414, 106 S. Ct. 2595, 2604, 91 L. Ed. 2d 335(1986) (plurality opinion) (discussing the application of *Ake*).

133 L. Ed. 2d 251 (1995) (per curiam) (emphasis added). In addition to being a state employee with the ability to speak to the prosecution about his report and the defense's case, Dr. Goff provided his report to the defense and prosecution at the same time. Clearly, the report did not serve as McWilliams's "own psychiatric evidence."[3]

In sum, far from simply being denied the chance to choose his own psychiatrist or receive funds to hire his own psychiatrist, McWilliams was deprived of basic access to a psychiatrist. Although his life was at stake and his case for mitigation was based on his mental health history, McWilliams received an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence. As a result, McWilliams was precluded from meaningfully participating in the judicial sentencing

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3. Indeed, we previously stated that "[t]he right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense deems appropriate." *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991) (internal quotation marks omitted). Furthermore, the Majority opinion puts us at odds with our sister circuits on this issue. *See Starr*, 23 F.3d at 1287-88, 1290-91, 1294 (examining the relationship between *Ake* and *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 73 S. Ct. 391, 97 L. Ed. 549 (1953) and reversing where the defendant was provided a "neutral" state examiner); *Smith v. McCormick*, 914 F.2d 1153, 1157-58 (9th Cir. 1990) (holding that *Ake* requires the provision of a non-neutral psychiatrist); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) ("The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution.").

hearing and did not receive a fair opportunity to rebut the State's psychiatric experts. Put simply, he was denied due process. *See Simmons v. South Carolina*, 512 U.S. 154, 164-65, 114 S. Ct. 2187, 2194, 129 L. Ed. 2d 133 (1994) (plurality opinion) (citing *Ake*, 470 U.S. at 83-87, 105 S. Ct. at 1096-98) (holding that defendant was denied due process where he was "prevented from rebutting information that the sentencing authority considered"). Given these circumstances, the state court's application of *Ake* was unreasonable.[4]

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4. The concurring opinion states that the Supreme Court has not addressed whether *Ake* is satisfied by the appointment of a neutral psychiatrist and, therefore, the state court did not unreasonably apply *Ake*. This focus on the "neutral expert" issue misses the point. Assuming for the sake of argument that a state's failure to provide a defendant access to his own psychiatrist is not contrary to *Ake*, the state court's decision is still an unreasonable application of *Ake*. As noted above, *Ake* plainly holds that when a defendant's mental health is a significant factor at trial or sentencing, due process requires that the defendant receive access to a psychiatrist who can competently "assist in [the] evaluation, preparation, and presentation of [his] defense." *See Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. Regardless of the "neutral expert" issue, Dr. Goff was unable to assist defense counsel with the preparation and presentation of the defense because he did not finish his report until hours before the sentencing hearing and did not have access to pivotal mental health records. Solely considering these deficiencies, it is clear that McWilliams was denied "the assistance of a psychiatrist for the *development* of his defense." *See Simmons*, 512 U.S. at 165, 114 S. Ct. at 2194 (emphasis added) (summarizing the holding in *Ake*). Said another way, the concurring opinion's focus on the "neutral expert" issue misses the broader controlling issue: whether McWilliams received access to meaningful expert assistance.

B. A Substantial and Injurious Effect

We are required to grant habeas relief for an "*Ake* error" if the error had a "substantial and injurious effect" on the trial or sentencing. *See Hicks v. Head*, 333 F.3d 1280, 1286 (11th Cir. 2003) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714, 123 L. Ed. 2d 353 (1993)) (internal quotation marks omitted). Alabama's *Ake* error had this effect on McWilliams's death sentence, as it precluded McWilliams from offering evidence that directly contradicted the psychiatric evidence put forward by the State.

At the penalty phase of his trial, McWilliams had no opportunity to respond to testimony provided by the State's expert psychiatrists opining that McWilliams was a malingerer who "faked" mental illness. He was reduced to reading to the judge and jury a technical psychiatric report that indicated he was potentially psychopathic, but the information was virtually useless in the absence of an expert who could explain the report and answer the State's questions. At the judicial sentencing hearing, McWilliams was again denied the assistance he required to respond to the State's expert testimony. Hence, as a result of the trial court's error, a convicted murderer had to testify about his own mental health, was called a liar by State experts, and then was prevented from showing otherwise.

Testimony from McWilliams's state post-conviction hearing shows that, with appropriate assistance, he would have been in position to confront the State's evidence that he was merely feigning mental health issues. At the

post-conviction hearing, Dr. George Woods—an expert in psychiatry and neurology—stated that McWilliams's psychiatric testing indicated a "cry-for-help." He then explained the difference between a "fake-bad" and a "cry-for-help" diagnosis; the former is "someone attempting to make themselves look worse," and the latter, while seemingly "very similar" to the former, actually reflects "significant psychiatric and psychological problems." Dr. Woods further contradicted the State's experts by concluding McWilliams was suffering from bipolar disorder the night of the crime. Dr. Woods's findings relied on, *inter alia*, records from the DOC showing McWilliams was medicated with antipsychotics and antidepressants throughout his entire incarceration. Due to the trial court's failures, McWilliams was wholly unable to present this or similar evidence during sentencing.

Despite this powerful evidence, the concurring opinion finds that McWilliams has not shown a substantial and injurious effect "in part because . . . [he] did not present Dr. Goff as a witness at the state post-conviction hearing[,]" and therefore, "we do not know how additional time with Dr. Goff (and his report) would have benefited the defense." *See* Concurring Op. at 32. But, this argument is belied by Dr. Woods's testimony, which shows that McWilliams would have presented "different," significantly "more viable" mental health evidence during sentencing if he was afforded an expert who actually reviewed his full psychiatric history and had more than a few hours to assist the defense. *See Hicks*, 333 F.3d at 1287.

Furthermore, when considering whether a defendant was prejudiced by a constitutional error that affected

his presentation of mitigation evidence, we are required to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweigh[] it against the evidence in aggravation." *See Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S. Ct. 1495, 1515, 146 L. Ed. 2d 389 (2000) (citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52, 110 S. Ct. 1441, 1449-50, 108 L. Ed. 2d 725 (1990)); *Hicks*, 333 F.3d at 1286-87 (weighing the mitigation evidence presented during trial and habeas proceedings in considering whether an *Ake* error had a substantial and injurious effect). In other words, we must consider the evidence *before us*. Nonetheless, my concurring colleague is dissuaded, in part, because "McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing." Concurring Op. at 32. In light of the relevant precedent, I am inclined, however, to weigh the evidence in the record, rather than opine about the value of hypothetical evidence not in the record. *See Williams*, 529 U.S. at 397-98, 120 S. Ct. at 1515.

After weighing the available evidence, we are required to ask ourselves: "does a grave doubt exist as to whether" the *Ake* error "substantially influence[d]" McWilliams's sentence? *See Duest v. Singletary*, 997 F.2d 1336, 1339 (11th Cir. 1993) (per curiam). To me, the answer to this question is clear. McWilliams has shown that but-for the trial court's *Ake* error, the court would have been faced with a starkly different record. McWilliams has put forth evidence contesting the Lunacy Commission, showing he was not malingering, and demonstrating that he suffered from a major mental illness at the time of the

crime. Therefore, I cannot find that the *Ake* error did not substantially influence McWilliams's sentence.

III.

Because the state court's resolution of McWilliams's *Ake* claim was an unreasonable application of *Ake* itself and this error had a substantial and injurious effect, I dissent. To remedy the error, I would reverse the district court's denial of the petition for a writ of habeas corpus so that the matter can be remanded to the state court for a new sentencing hearing.

APPENDIX D — MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION, FILED FEBRUARY 1, 2008

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

CV-04-RDP-RRA-2923-W

JAMES E. McWILLIAMS,

Petitioner,

v.

DONAL CAMPBELL, COMMISSIONER
OF THE ALABAMA DEPARTMENT OF
CORRECTIONS, *et al.*,

Respondents.

February 1, 2008, Decided
February 1, 2008, Filed

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This action seeks habeas corpus relief with respect to petitioner James E. McWilliams' state court conviction and death sentence on a charge of capital murder. (*See* 28 U.S.C. § 2254).

Appendix D

(TABLES INTENTIONALLY OMITTED)

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Claim X. James McWilliams' Due Process Right to the Assistance of a Partisan Psychiatrist Was Violated During Both Penalty Phases of the Trial.

The Alabama Supreme Court made the following statements concerning this claim:

The appellant argues that his rights to due process were violated during the penalty phase of his trial, because he was denied the right to the assistance of a psychiatrist. The record indicates that prior to trial the appellant filed a motion requesting a competency examination to determine whether he was sane and whether he was subject to any mental conditions which would bring certain mitigating circumstances into evidence. The trial court granted the motion and ordered a lunacy commission to evaluate the appellant's sanity at the time of the crime, at the time of the evaluation, and as it might relate to any statutory mitigating circumstances. The appellant was evaluated at Taylor-Hardin Secure Medical Facility. Thereafter, during the penalty stage before the jury, the appellant and his mother testified that he had suffered two head injuries that had caused him to seek medical attention. They further testified that his behavior became more destructive and violent following the head injuries. The appellant was also allowed to read into evidence a medical report, which was made by a Dr. Davis prior to the offense, and which indicated that he suffered from an atypical

paranoid disorder with schizoid features. The appellant also testified that he had consulted a neurosurgeon about his head injuries, but that the neurosurgeon had told him that the headaches were "not a neurological disorder, that it was probably something that a psychiatrist had to take care of." On rebuttal, the State presented the testimony of Dr. Nagi, one of the lunacy commission psychiatrists who evaluated the appellant at Taylor-Hardin Secure Medical Facility, and Dr. Poythress, a clinical psychologist who was a member of the treatment team that evaluated the appellant. Dr. Nagi testified that the appellant exhibited no symptoms suggestive of head injury when he was at Taylor-Hardin.

After the jury returned an advisory verdict of death, the appellant requested that he be evaluated for possible organic brain damage. The trial court granted the motion, and the appellant was examined by a neuropsychologist, Dr. John Goff. After receiving the neuropsychological report, and prior to his sentence hearing before the trial court, the appellant requested a continuance because he had only two days to review the report. The motion was renewed prior to the trial court's sentencing, defense counsel stating as grounds the late receipt of the report and the inability of defense counsel, as a layman concerning psychological matters, to determine what material from the report, if any, to present with regards to the case. The defense counsel stated that he could not determine whether "the type of diagnosed illness," i.e., organic brain dysfunction, exists. The trial court denied the motion for continuance and told defense counsel to return that afternoon for closing argument

and sentencing. After the recess, the trial court stated that it had reviewed the records and the defense counsel again moved for a continuance. The trial court denied the motion, stating: "Well this Court has reviewed the records and this Court finds apparent throughout all the records the following quotes: 'No evidence of psychosis; no psychosis; not psychotic; faking; feigning, seen as manipulative; et cetera.'" The trial court then reiterated that it would give defense counsel the opportunity to make a motion to evaluate the reports when court reconvened in the afternoon. The defense counsel replied that he had no time to do that. The report from Dr. Goff was admitted and was considered as mitigating evidence.

The appellant claimed that the psychiatric assistance provided to him was inadequate under *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), because the psychiatrists' reports were given to and were used by the State against him and because he was entitled to additional assistance to interpret certain of their reports prior to sentencing. The appellant claims that the State used the testimony of one of the psychiatrists and one of the psychologists who had examined him, after the State had received a report from the lunacy commission, in order to obtain a recommendation of death by the jury. The appellant argues that the use of this testimony violates *Smith v. McCormick*, 914 F.2d 1153 (9th Cir.1990), which held that *Ake v. Oklahoma*, supra, precludes a confidential report from an adversarial, i.e. not neutral, psychiatrist from being used against the defendant, unless the appellant calls an expert to testify. The State argues that when the appellant read into evidence the

psychiatric report of Dr. Davis, which had been made just prior to the offense, he put his mental status at issue by relying on expert testimony, and thus enabled the State to offer the results of the court-ordered psychological evaluation requested by the appellant. The defense argues, in response, that this expert testimony offered by the State was actually in rebuttal to the lay testimony of the appellant and his mother.

In *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), the petitioner attempted to establish at trial the defense of "extreme emotional disturbance," by having a social worker read excerpts from several psychological evaluations of the petitioner that had been made following a previous arrest. On cross-examination, the prosecutor attempted to rebut this defense by having the social worker read excerpts from another evaluation, which had been prepared by a psychiatrist on the joint motion of the petitioner and the prosecution following his arrest in the case at issue. The Supreme Court of Kentucky held that the petitioner had opened the door for the admission of the report by introducing earlier reports that were favorable to him and that the introduction of the latter report did not violate the petitioner's rights under *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). FN1.

> FN1. In *Estelle v. Smith*, supra, the prosecutor called a psychiatrist as the only witness in a capital sentencing hearing. The psychiatrist had examined the petitioner at the request of the trial judge, who had not notified defense

> counsel about the scope of the examination or apparently even the existence of the examination. Moreover, the petitioner had not placed at issue his competency to stand trial, nor had he offered an insanity defense. The United States Supreme Court held that the petitioner's Fifth Amendment rights were violated by the presentation of this testimony.

The United States Supreme Court distinguished *Estelle v. Smith*, supra, noting that the trial court had ordered, sua sponte, the psychiatric examination in that case and that the petitioner had neither asserted an insanity defense nor offered any psychiatric evidence at trial. The Court further stated:

> We thus acknowledge that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense.
>
> 'When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant may be required to submit to a sanity examination conducted by the prosecutor's psychiatrist.' [*Estelle v. Smith*], at 465 [101 S. Ct. at 1874].

> We further noted: 'A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.' Id., at 468 [101 S. Ct. at 1875]. This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."

Buchanan v. Kentucky, supra, 483 U.S. at 422, 107 S. Ct. at 2917. The Court held that, under the facts of *Buchanan v. Kentucky*, supra, the introduction of the psychiatrist's report by the prosecution for the limited rebuttal purpose did not violate the Fifth Amendment. The Court further held that the introduction of the report did not violate the petitioner's Sixth Amendment right to the assistance of counsel, because defense counsel was on notice that he intended to put on a "mental status" defense for the petitioner and would therefore "have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Buchanan v. Kentucky*, supra, 483 U.S. at 425, 107 S. Ct. at 2919. In so holding, the United States Supreme Court also stated, in a footnote, that the petitioner's deterrence argument was without merit. The appellant in the present

case makes the same argument. The United States Supreme Court replied to this argument, stating:

> Petitioner contends that, if the use of a pretrial psychological evaluation is allowed, as in this case, defense counsel will be reluctant to request competency evaluations, even if they believe that their clients are in need of one, or they may 'sandbag' the trial by raising the competency issue in a post-trial motion. . . . Moreover, petitioner argues that the rule requiring competency examinations when the trial judge has doubts about the defendant's mental condition, . . ., will be undermined by a decision in favor of the Commonwealth.
>
> While we cannot foresee the tactics of defense counsel, we find somewhat curious petitioner's prediction and proposed solution. Where a competency examination is required . . . and where the defendant does not place his mental state at issue, the Fifth and Sixth Amendments would mandate that he be allowed to consult with counsel and be informed of his right to remain silent. We observed in Smith that if, after receiving such advice and warnings, a defendant expresses his desire to refuse to answer any questions, the examination can still proceed 'under the condition that the results would be applied solely for that purpose.' [*Estelle v. Smith*,] 451 U.S., at 468 [101 S. Ct. at 1875]. Thus, where a defendant does not make

> an issue of his mental condition, we fail to see how the decision today will undermine *Pate [v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)]. Where, however, a defendant places his mental status at issue and thus relies upon reports of psychological examinations, he should expect that the results of such reports may be used by the prosecutor in rebuttal.

Buchanan v. Kentucky, supra, at 426, fn. 21, 107 S. Ct. at 2919, fn. 21.

The holding in *Ake v. Oklahoma*, supra, requires that, if a defendant makes a threshold showing that his sanity is likely to be a significant factor at trial, the State must provide access to a psychiatrist's assistance, if the defendant cannot otherwise afford one. In the present case, the appellant was provided with psychiatric assistance; thus the principle of Ake was not violated. Moreover, because the appellant placed his mental status at issue by reading into evidence the earlier psychiatrist's report, the State could properly rebut this evidence by introducing evidence from the court-ordered psychiatric evaluation. *Buchanan v. Kentucky*, supra.

Although the appellant argues that he was entitled to additional psychiatric assistance to aid him in evaluating Dr. Goff's report, which was received prior to the trial court's sentencing, the requirements of *Ake v. Oklahoma*, supra, are met when the State provides the appellant with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine the appellant. There is no

indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings. Moreover, the trial court indicated that it would have considered a motion to present an expert to evaluate this report. "Although additional psychiatric testimony might have been desirable . . . it was not required under the constitution." *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir.1986).

McWilliams, 640 So. 2d at 988-991.

McWilliams makes the following argument in support of this claim:

When counsel requested the appointment of a psychiatrist to assist the defense, the court appointed a neutral expert and made his work product available to the prosecution, as well as the defense, in blatant violation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). The prosecution used the fruits of the psychiatric examination that counsel initiated to obtain a jury recommendation of death.

Defense counsel demonstrated a need for additional assistance from a psychiatrist to prepare for the sentencing hearing. The court ordered a further psychiatric evaluation, but it refused to provide counsel with access to an expert to "assist in evaluation, preparation and presentation" of his case. *Ake v. Oklahoma*, 470 U.S. at 83. The accuracy of the sentencing hearing was seriously damaged by this violation of due process. The second

evaluation produced significant mitigating evidence of organic brain damage, but counsel did not understand the expert's report. Because he was unable to explain it to the court, the court mistakenly found that it did not establish a mitigating circumstance.

Ake Violations During Jury Recommendation of Sentencing

In the landmark case of Ake v. Oklahoma, the Supreme Court held that due process sometimes requires the appointment of a psychiatrist to assist an indigent defendant and his lawyer in a capital sentencing trial. 470 U.S. at 83. A defendant is entitled to this assistance when he makes "a preliminary showing" that his mental condition "is likely to be a significant factor at trial." 470 U.S. at 74.

In the present case, defense counsel made a sufficient showing of need to trigger James McWilliams' due process right to the assistance of a psychiatrist in the penalty phase of the trial when he advised the court that appellant was receiving psychotropic medication and behaving erratically. *See, e.g., Ake v. Oklahoma*, 470 U.S. at 71. In an effort to comply with *Ake v. Oklahoma*, the court ordered a psychiatric examination of appellant at Taylor Hardin Secure Medical Facility, but the results of the examination were disclosed to the prosecution, as well as the defense. The defense elected not to use any part of the Taylor Hardin evaluation during the jury trial on the issue of punishment, but the prosecution still used the testimony of the experts who evaluated James at Taylor Hardin.

Appendix D

While James McWilliams did not have a "constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own" expert, he was entitled to the assistance of a partisan psychiatrist selected for him by the court. *Ake v. Oklahoma*, 470 U.S. at 83. Due process can be satisfied by providing the defendant with the assistance of a partisan psychiatrist at a state hospital, such as Taylor Hardin. *See, e.g., Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir. 1986); *Garrison v. State*, 520 So.2d 219, 221 (Ala. 1987). The examination of the defendant by "neutral psychiatrists" at a state hospital was *not* sufficient. *Ake v. Oklahoma*, 470 U.S. at 85.

The defense psychiatrist's evaluation of James McWilliams should have been covered by the attorney-client privilege, unless the defense called the expert as a witness or presented his report in evidence. *Miller v. District Court, City & County of Denver*, 737 P.2d 834, 836-37 (Colo. 1987) (and cases cited therein); *Ballew v. State*, 640 S.W.2d 237 (Tex. Crim. App. 1980). Disclosure of the Taylor Hardin evaluation to the prosecution was as unacceptable as compelling defense counsel to turn over his notes of his interview with the defendant. *Id.*

Defense counsel did not waive the confidentiality of the Taylor Hardin evaluation by presenting lay testimony about appellant's mental condition. *Miller v. District Court*, 737 P.2d at 838 (and cases cited therein). A waiver based solely on the presentation of lay testimony to prove a mental status defense "would chill the defendant's dialogue" with the defense psychiatrist and frustrate the policy underlying the attorney-client privilege. *Id.* at 839 (*citing Ake v. Oklahoma*).

The jury's recommendation of death must be reversed, although defense counsel did not object to the disclosure of the Taylor Hardin evaluation to the prosecution or the testimony of the Taylor Hardin experts. In a capital case, "the 'plain error' doctrine, as enunciated in rule 45A," requires a decision on the merits of any error that adversely affected a substantial right of the defendant. *Ex Parte Johnson*, 507 So.2d 1351, 1356 (Ala. 1986). James' due process right to the assistance of partisan dense psychiatrist was completely eviscerated when the prosecution used the psychiatrist's privileged work product to obtain a recommendation of death from the jury.

Ake Violation During Sentencing by the Court

A further violation of *Ake v. Oklahoma* occurred during the sentencing hearing that the court conducted. After the jury recommended the death penalty, defense counsel requested the assistance of an expert to determine whether appellant had organic brain damage. Counsel made the necessary "threshold showing to the trial court," *Ake v. Oklahoma*, 470 U.S. at 83, by alleging that James sustained two head injuries and received psychiatric treatment in prison. The court ordered a complete neuropsychological examination of appellant, but it did not provide all of the assistance that was required to give him "[m]eaningful access to justice." *Ake v. Oklahoma*, 470 U.S. at 77.

When an indigent defendant demonstrates to the trial court that his mental condition is likely to be a significant

factor in his capital sentencing trial, as James McWilliams did, "the State must, at minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation and presentation of the defense.*" *Ake v. Oklahoma*, 470 U.S. at 83 (emphasis added). The court ordered an appropriate examination, but it refused to give counsel access to an expert to assist him in preparing and presenting his case.

Dr. John Goff was hired by the state to perform the neuropsychological examination that the court ordered to assist the defense. The neuropsychological tests were so difficult to interpret that they presented a "diagnostic dilemma" to Dr. Goff. Defense counsel received Dr. Goff's written report less than two days before the sentencing hearing. He did not understand it, but he sensed that it was sufficiently favorable to merit further investigation. Counsel advised the court that he lacked the expertise to interpret the highly technical report. He explained that Dr. Goff's findings appeared to conflict with the findings of the Taylor Hardin experts. Counsel literally begged the court for an opportunity to consult with an expert who could explain the report to him. The court refused to allow this.

Dr. Goff's report was placed in evidence without explanation, because James had "no expert witness" to "introduce on his behalf evidence in mitigation of his punishment." *Ake v. Oklahoma*, 470 U.S. at 73. The report was useless without the testimony of a defense expert to explain it. Compare *Magwood v. Smith*, 791 F.2d at 1443

(no *Ake* violation because "three experts gave testimony highly favorable" to defense about their findings). Defense counsel could not be expected to interpret the report without the assistance of an expert, any more than he could be expected to perform the battery of sophisticated neuropsychological tests that Dr. Goff administered. *Ake v. Oklahoma*, 470 U.S. at 83.

The "potential accuracy" of the sentencing verdict would have been "dramatically enhanced" if counsel had the assistance of an expert to help him "translate a medical diagnosis into language" that the court would have understood *Ake v. Oklahoma*, 470 U.S. at 81, 83. When a person sustains a serious head injury, as appellant did on two occasions, and his brain is damaged in the manner that Dr. Goff described in his report, he is likely to undergo "a marked change in personality." Kaplan and Sadock, *Comprehensive Textbook of Psychiatry*, 548, 489, 877 (4th Ed. 1985). Through no fault of his own, he will begin to engage in violent conduct. *Id.* at 964; *accord* R. Slovenko, *Psychiatry and Law*, 400 (1973). If the defense had been able to prove with expert testimony that appellant was "less able than a normal adult to control his impulses" because his brain was injured, this could have dramatically altered the sentencing calculus. *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 2949, 106 L. Ed. 2d 256 (1989).

Expert testimony about Dr. Goff's report would also have nullified the testimony of the experts from Taylor Hardin, who concluded that appellant merely suffered from an antisocial personality disorder. *See, e.g., Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir.

1989). The symptoms of organic brain damage mimic the symptoms of the antisocial personality disorder. Kaplan and Sadock, *supra*, 1866-68; R. Slovenko, *supra*, at 400. The Taylor Hardin experts based their diagnosis of antisocial personality disorder on a notoriously unreliable mental status examination. While "psychiatrists widely and frequently disagree on what constitutes mental illness," *Ake v. Oklahoma*, 470 U.S. at 81, virtually all competent experts agree that mental status examination is inadequate to determine whether antisocial conduct is caused by organic brain damage or an antisocial personality disorder. Kaplan and Sadock, *supra*, at 835.

The defense would surely have prevailed in a battle of the experts, if counsel had been given an opportunity to present the "opposing views" of an expert, who understood why Dr. Goff's report was obviously superior to the Taylor Hardin evaluation. *See Ake v. Oklahoma*, 470 U.S. at 84. Dr. Goff administered a battery of neuropsychological tests, including the Halstead test. These tests are widely considered to be the most valid and reliable tool for detecting organic brain damage. Filskov and Goldstein, *Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery*, 42 J. of Consulting and Clinical Psych. 382 (1974); Schreiber, Goldman, Goldfader and Snow, *The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment*, 162 J. of Nervous and Mental Disease 360 (1976).

The defense was absolutely "devastated by the absence of...psychiatric...testimony" about these complex issues.

Ake v. Oklahoma, 470 U .S. at 83. James McWilliams' death sentence must be vacated because he was entitled to the assistance of an expert who could have explained to the court why Dr. Goff's diagnosis of organic brain damage called for a less severe penalty.

Therefore, the Alabama Courts' decisions were contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their discretion in their factual holdings and failure to properly consider all of the facts in this case. A new sentencing proceeding must therefore be ordered.

Petition at 93-99.

The Use of Testimony from the Lunacy Commission

The respondent contends that the claim that has not been exhausted because it was not fairly presented to the Supreme Court of Alabama during the direct appeal. *Respondents' Brief on the Grounds for Relief Presented in McWilliams' Petition for Writ of Habeas Corpus*, Court Document 11, at 31. The Alabama Supreme Court recited some of the facts upon which this claim is based, but the court did not deal with the issue the petitioner now presents to this court.

In his reply brief, however, the petitioner states:

> The State claimed the *Ake* violation at the penalty stage has not been exhausted because it was never presented to the Alabama Supreme Court. However, the Alabama Supreme Court had plain error review, held it reviewed James' record for not raised plain error, and reviewed the issues he raised before the Court of Appeals, and James raised the issue before the Court of Appeals, making it more likely the state appellate court came across the claim during its review of the record. *Julius v. Johnson* 840 F.2d at 1546, fn. 10. Hence James exhausted the issue.

Petitioner's Reply Brief, Court Document 16, at 22.

The Supreme Court has held that:

> [b]efore seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the "'"opportunity to pass upon and correct" alleged violations of its prisoners' federal rights.'" *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) *(per curiam)* (quoting *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby

> alerting that court to the federal nature of the claim. *Duncan, supra*, at 365-366, 115 S. Ct. 887; *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). This case focuses upon the requirement of "fair presentation."

Baldwin v. Reese, 541 U.S. 27, 29, 124 S. Ct. 1347, 1349, 158 L. Ed. 2d 64 (2004).

In the instant case, McWilliams argues that because he raised this issue to the Court of Appeals, and because the Alabama Supreme Court reviewed the record for not raised plain error, and reviewed the issues the petitioner raised before the Court of Appeals, the claim was "fairly presented."[18] This argument is akin to that made by the petitioner in *Baldwin*. The *Baldwin* court summarized the facts of that case as follows:

> Michael Reese, the respondent, appealed his state-court kidnaping and attempted sodomy convictions and sentences through Oregon's state court system. He then brought collateral relief proceedings in the state courts (where he was represented by appointed counsel). After the lower courts denied him collateral relief, Reese filed a petition for discretionary review in the Oregon Supreme Court.

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18. The Petitioner does not use the term "fairly presented" or even argue that standard. However, since that standard is the one which applies, the court will apply it.

The petition made several different legal claims. In relevant part, the petition asserted that Reese had received "ineffective assistance of both trial court and appellate court counsel." App. 47. The petition added that "his imprisonment is in violation of [Oregon state law]." *Id.*, at 48. It said that his *trial* counsel's conduct violated several provisions of the *Federal* Constitution. *Ibid.* But it did not say that his separate *appellate* "ineffective assistance" claim violated *federal* law. The Oregon Supreme Court denied review.

Reese ultimately sought a federal writ of habeas corpus, raising, among other claims, a federal constitutional claim that his *appellate* counsel did not effectively represent him during one of his direct state-court appeals. The Federal District Court held that Reese had not "fairly presented" his federal "ineffective assistance of appellate counsel" claim to the higher state courts because his brief in the state appeals court had not indicated that he was complaining about a violation of *federal* law.

A divided panel of the Ninth Circuit reversed the District Court. 282 F.3d 1184 (2002). Although the majority apparently believed that Reese's petition itself did not alert the Oregon Supreme Court to the federal nature of the appellate "ineffective assistance" claim, it did not find that fact determinative. *Id.*, at 1193-

> 1194. Rather, it found that Reese had satisfied the "fair presentation" requirement because the justices of the Oregon Supreme Court had had "the *opportunity* to read ... the lower [Oregon] court decision claimed to be in error before deciding whether to grant discretionary review." *Id.*, at 1194 (emphasis added). *Had they read the opinion of the lower state trial court*, the majority added, the justices would have, or should have, realized that Reese's claim rested upon federal law. *Ibid.*
>
> We granted certiorari to determine whether the Ninth Circuit has correctly interpreted the "fair presentation" requirement.

Baldwin, 541 U.S. at 29-30, 124 S. Ct. At 1349 - 1350 (emphasis in original).

The *Baldwin* court held:

> [T]o say that a petitioner "fairly presents" a federal claim when an appellate judge can discover that claim only by reading lower court opinions in the case is to say that those judges *must* read the lower court opinions-for otherwise they would forfeit the State's opportunity to decide that federal claim in the first instance. In our view, federal habeas corpus law does not impose such a requirement.

Id. at 31. Further, the Court wrote:

> [O]rdinarily a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.

Id. at 32.

McWilliams' reliance on *Julius v. Johnson*, 840 F.2d 1533 (11th Cir. 1988), an Eleventh Circuit case decided sixteen years before the Supreme Court's decision in *Baldwin*, is misplaced. In *Julius*, the Eleventh Circuit clearly stated that:

> the mere existence of a "plain error" rule does not preclude a finding of procedural default; moreover, the assertion by an Alabama court that it did not find any errors upon its independent review of the record does not constitute a ruling on the merits of claims not raised in that court or in any court below.

Julius v. Johnson, 840 F.2d 1533, 1546 (11th Cir. 1988). Further, the footnote cited by the petitioner clearly states that the Court of Appeals never decided the issue in the instant case. *Julius*, 840 F.2d at 1546 n. 10 ("Nor need we decide whether such language permits federal review where the defendant raised the claim at trial, thus making it more likely that the state appellate court came across the claim during its review of the record.").

McWilliams makes no claim that the issues contained in this part of his habeas petition were raised to the Supreme Court of Alabama in a petition or a brief or a similar document. Thus, as to this claim, McWilliams did not exhaust available state remedies as required by *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 1732-33, 144 L. Ed. 2d 1 (1999).

However, a petitioner may still have his claim decided on the merits even if he failed to exhaust available state remedies, if he can show cause and prejudice or actual innocence. The petitioner has offered nothing in the way of cause to excuse his failure to present this claim to the Alabama Supreme Court. Further, as previously discussed, McWilliams has not made a showing that he is actually innocent. Thus, McWilliams is procedurally barred from raising this claim in federal court.

Whether *Ake* Was Violated by not Providing Petitioner with Expert Assistance at the Judicial Phase of the Sentencing

McWilliams again cites *Ake v. Oklahoma*, 470 U.S. 68, 74, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), where the Supreme Court held:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

Appendix D

Ake v. Oklahoma, 470 U.S. 68, 74, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Further, the *Ake* Court held:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Ake, 470 U.S. at 83. Further, with respect to rebuttal purposes at the sentencing phase, the Court held:

> Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

Id. at 84.

Appendix D

McWilliams contends that the trial court erred because, even though it ordered an examination of the defendant to determine if he had organic brain damage, at the sentencing proceeding "it refused to give counsel access to an expert to assist him in preparing and presenting his case." *Petition* at 96.

The psychological testing requested by McWilliams was ordered by the trial court, and, therefore, he received the assistance required by *Ake*. Dr. Goff completed the testing and a report was given to both the petitioner and the respondent. McWilliams complains that counsel "lacked the expertise to interpret the highly technical report," that "the report was useless without the testimony of a defense expert to explain it," and "defense counsel could not be expected to interpret the report without the assistance of an expert, any more than he could be expected to perform the battery of sophisticated neuropsychological tests that Dr. Goff administered." *Petition* at 97.

There is no evidence that Dr. Goff was unavailable to the petitioner for consultation or to call as a witness. Indeed, the record indicates that McWilliams never requested Dr. Goff's assistance. Instead, McWilliams' counsel insisted that a different expert review Dr. Goff's findings.

In discussing the right to psychiatrist's assistance the *Ake* court was clear:

> [t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

470 U.S. at 83. Further, the *Ake* court limited psychological assistance to one expert. *Id.* at 78-79 ("This is especially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today.") Dr. Goff was the expert appointed for McWilliams. The onus was McWilliams' counsel to consult Dr. Goff if he had questions or did not understand the report. Not only could Dr. Goff have explained the report to counsel, but also to the jury. [19]

As the Supreme Court said:

> Although the appellant argues that he was entitled to additional psychiatric assistance to aid him in evaluating Dr. Goff's report, which was received prior to the trial court's sentencing, the requirements of *Ake v. Oklahoma*, supra, are met when the State provides the appellant with a competent psychiatrist. The State met

19. Notably, the *specific* testing requested by counsel for the Petitioner was ordered in this case. This minimizes somewhat the claim that he could not understand these tests or their results.

> this requirement in allowing Dr. Goff to examine the appellant. There is no indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings. Moreover, the trial court indicated that it would have considered a motion to present an expert to evaluate this report. "Although additional psychiatric testimony might have been desirable . . . it was not required under the constitution." *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir.1986).

McWilliams, 640 So. 2d at 988-991.

Thus, the Court of Criminal Appeals' ruling on this issue was not contrary to clearly established Federal law as determined by the United States Supreme Court and did not involve an unreasonable application of clearly established Federal law as determined by the United States Supreme Court. This claim is due to be denied.

***

RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

In accord with the foregoing, the magistrate judge recommends that McWilliams' petition for a writ of habeas corpus and his requests for an evidentiary hearing be DENIED.

Appendix D

The parties have until February 15, 2008 to file objections. *In order to save everyone concerned time and effort, if the substance of an objection is that which has been set out already in pleadings or argument, the party objecting may simply* ***refer*** *to his previous argument, instead of repeating his argument in full in the form of objections.*

Done this 1st day of February, 2008.

/s/ Robert R. Armstrong, Jr.
Robert R. Armstrong, Jr.
United States Magistrate Judge

APPENDIX E—OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA, DATED AUGUST 23, 1991

COURT OF CRIMINAL APPEALS OF ALABAMA

No. 6 Div. 190

JAMES EDMUND MCWILLIAMS

v.

STATE

August 23, 1991

OPINION

McMILLAN, Judge.

The appellant was indicted in a four-count indictment on charges of capital murder: counts I and II of the indictment charging the appellant with committing murder during a robbery in the first degree, in violation of § 13A-5-40(a)(2), *Code of Alabama 1975;* count III charging the commission of murder during rape in the first degree, in violation of § 13A-5-40(a)(3), *Code of Alabama 1975;* and count IV charging the appellant with committing murder during sodomy in the first degree, in violation of § 13A-5-40(a)(3), *Code of Alabama 1975.* Subsequently, count IV of the indictment was dismissed. Following the trial, the appellant was found guilty as charged in counts I through III of the indictment, and following a separate sentencing

hearing the jury, by a vote of 10 to 2, recommended a verdict of death. Thereafter, the trial court conducted a separate sentencing hearing, following which the appellant was sentenced to death by electrocution.

This court adopts the trial court's specific findings concerning the circumstances of the crime and the appellant's participation therein, as set forth below:

> "The defendant, James Edmund McWilliams, Jr., raped, robbed, and murdered Patricia Vallery Reynolds. The crime occurred on December 30, 1984 at Austin's Food Store, Hargrove Road, Tuscaloosa, Alabama.
>
> "Patricia Vallery Reynolds was a clerk at Austin's, a convenience store. The defendant went into the store, locked the front doors, robbed Mrs. Reynolds by taking money from her possession, took her to the back room and brutally raped her, then shot her with a .38 caliber pistol. There were 16 gunshot wounds (8 entrance, 8 exit). She was initially shot while standing, and also shot while lying on the floor. She was shot 6 times, with 2 of the bullets first penetrating her hand or arm before entering and exiting her body. The bullets penetrated both lungs, both hemidiaphragms, the liver, pancreas, stomach, spleen, upper forearms, and hand.
>
> "Mrs. Reynolds died in surgery at 12:40 a.m. The cause of death was exsanguination.

Appendix E

"The defendant was identified by eyewitnesses who placed him at the scene.

"The defendant was apprehended in Findlay, Ohio, driving a stolen car. The murder weapon (also stolen) was in his possession. He was jailed in Ohio, charged with auto theft, possession of stolen property, carrying a concealed weapon, and no operator's license. In the Ohio jail, he bragged to other inmates that he had robbed, raped, and killed a woman in Alabama.

"The jury deliberated less than one hour before returning a verdict of guilty. The following day, the jury recommended the death penalty."

I

The appellant argues that the trial court denied him an individualized determination of the appropriate punishment by refusing to consider his organic brain damage as a mitigating circumstance. The record indicates that, during the penalty stage of his trial before the jury, the appellant presented evidence that he had suffered two head injuries and that he had visited medical professionals as a result of those head injuries. During his sentencing hearing before the trial judge, the appellant presented evidence indicating that he might suffer from some organic brain dysfunction, although, as that court noted, the report suggesting such dysfunction also indicated that the appellant was exaggerating his problems.

Appendix E

The record further reveals that the trial court did consider this mitigating circumstance, but found that it was not supported by the evidence. In his sentencing findings, the trial court first considered the statutory mitigating circumstances, stating in pertinent part:

> "This Court finds that the preponderance of the evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance.
>
> "Evidence was presented as to this circumstance during Phase II of this trial, being the punishment phase; however, after consideration of this evidence, this Court finds that the preponderance of the evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance."

Thereafter, in considering the nonstatutory mitigating circumstances presented by the appellant, the trial court stated:

> "In addition to the above enumerated mitigating circumstances, the defendant was given the opportunity during the 2nd phase of the trial before the jury returned its advisory verdict to present any other evidence of mitigating circumstances and to make any statement of mitigating circumstances. The defendant testified that he received two blows to the head at various times and places, and this resulted in some organic brain damage.

Appendix E

"Following the verdict of the jury recommending the death penalty, the defendant requested that this Court order neurological and neuropsychological testing, and this request was granted.

"This Court interprets Section 13A-5-47 of the Code of Alabama 1975 as limiting . . . what additional evidence may be presented in the 3rd phase, the exception being evidence in response to any part of the pre-sentence investigation report which is the subject of factual dispute.

"Nevertheless, the Court reviewed additional evidence presented by the defense as to the result of the neurological and neuropsychological testing of the defendant and other medical records of the defendant made a part of the record from Holman Prison and from Taylor-Hardin Secure Medical Facility, and after a careful review and consideration of these records and reports, the Court finds that the defendant was not and is not psychotic, either from organic brain dysfunction or any other reason. The Court does find that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that this does not rise to the level of a mitigating circumstance. The Court finds that the preponderance of the evidence from these tests and reports show the defendant to be feigning, faking, and manipulative.

"The Court further finds that even if this did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance."

"'It is not required that evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the trial judge.' *Mikenas v. State*, 407 So.2d 892, 893 (Fla. 1981).

> "'"'Although consideration of all mitigating circumstances is required by the United States Constitution, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the decision of whether a particular mitigating circumstance and sentencing is proven and the weight to be given it rests with the judge and jury. *Lucas v. State*, 376 So.2d 1149 (Fla. 1979)." *Smith v. State*, 407 So.2d 894, 901 (Fla. 1981).'"

Harrell v. State, 470 So.2d 1303, 1308 (Ala.Cr.App.1984), affirmed, 470 So.2d 1309 (Ala.1985), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985).

> "It is not required that the evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the sentencer, in this case,

> the trial court; although consideration of all mitigating circumstances is required, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer. *Cochran v. State,* 500 So.2d 1161 (Ala.Cr.App 1984), affirmed in pertinent part, remanded on other part, 500 So.2d 1179 (Ala. 1985), affirmed on return to remand, 500 So.2d 1188 (Ala.Cr.App.), affirmed, 500 So.2d 1064 (Ala. 1986), cert. denied, 481 U.S. 1033, 107 S.Ct. 1965, 95 L.Ed. 2d 537 (1987)."

Haney v. State, 603 So.2d 368 (Ala.Cr.App.1991). See also *Bankhead v. State,* 585 So.2d 97 (Ala.Cr.App.1989), remanded on other grounds, 585 So.2d 112 (Ala.1991) ("[w]hile *Lockett* and its progeny require consideration of all evidence submitted as mitigating, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority").

The trial court clearly found that the evidence presented by the appellant did not rise to the level of a mitigating circumstance. We find no abuse of the trial court's discretion in this regard.

II

The appellant argues that his rights to due process were violated during the penalty phase of his trial, because he was denied the right to the assistance of a psychiatrist. The record indicates that prior to trial the appellant filed a

motion requesting a competency examination to determine whether he was sane and whether he was subject to any mental conditions which would bring certain mitigating circumstances into evidence. The trial court granted the motion and ordered a lunacy commission to evaluate the appellant's sanity at the time of the crime, at the time of the evaluation, and as it might relate to any statutory mitigating circumstances. The appellant was evaluated at Taylor-Hardin Secure Medical Facility. Thereafter, during the penalty stage before the jury, the appellant and his mother testified that he had suffered two head injuries that had caused him to seek medical attention. They further testified that his behavior became more destructive and violent following the head injuries. The appellant was also allowed to read into evidence a medical report, which was made by a Dr. Davis prior to the offense, and which indicated that he suffered from an atypical paranoid disorder with schizoid features. The appellant also testified that he had consulted a neurosurgeon about his head injuries, but that the neurosurgeon had told him that the headaches were "not a neurological disorder, that it was probably something that a psychiatrist had to take care of." On rebuttal, the State presented the testimony of Dr. Nagi, one of the lunacy commission psychiatrists who evaluated the appellant at Taylor-Hardin Secure Medical Facility, and Dr. Poythress, a clinical psychologist who was a member of the treatment team that evaluated the appellant. Dr. Nagi testified that the appellant exhibited no symptoms suggestive of head injury when he was at Taylor-Hardin.

Appendix E

After the jury returned an advisory verdict of death, the appellant requested that he be evaluated for possible organic brain damage. The trial court granted the motion, and the appellant was examined by a neuropsychologist, Dr. John Goff. After receiving the neuropsychological report, and prior to his sentence hearing before the trial court, the appellant requested a continuance because he had only two days to review the report. The motion was renewed prior to the trial court's sentencing, defense counsel stating as grounds the late receipt of the report and the inability of defense counsel, as a layman concerning psychological matters, to determine what material from the report, if any, to present with regards to the case. The defense counsel stated that he could not determine whether "the type of diagnosed illness," i.e., organic brain dysfunction, exists. The trial court denied the motion for continuance and told defense counsel to return that afternoon for closing argument and sentencing. After the recess, the trial court stated that it had reviewed the records and the defense counsel again moved for a continuance. The trial court denied the motion, stating: "Well this Court has reviewed the records and this Court finds apparent throughout all the records the following quotes: 'No evidence of psychosis; no psychosis; not psychotic; faking; feigning, seen as manipulative; et cetera.'" The trial court then reiterated that it would give defense counsel the opportunity to make a motion to evaluate the reports when court reconvened in the afternoon. The defense counsel replied that he had no time to do that. The report from Dr. Goff was admitted and was considered as mitigating evidence.

Appendix E

The appellant claimed that the psychiatric assistance provided to him was inadequate under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), because the psychiatrists' reports were given to and were used by the State against him and because he was entitled to additional assistance to interpret certain of their reports prior to sentencing. The appellant claims that the State used the testimony of one of the psychiatrists and one of the psychologists who had examined him, after the State had received a report from the lunacy commission, in order to obtain a recommendation of death by the jury. The appellant argues that the use of this testimony violates *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990), which held that *Ake v. Oklahoma*, supra, precludes a confidential report from an adversarial, i.e. not neutral, psychiatrist from being used against the defendant, unless the appellant calls an expert to testify. The State argues that when the appellant read into evidence the psychiatric report of Dr. Davis, which had been made just prior to the offense, he put his mental status at issue by relying on expert testimony, and thus enabled the State to offer the results of the court-ordered psychological evaluation requested by the appellant. The defense argues, in response, that this expert testimony offered by the State was actually in rebuttal to the lay testimony of the appellant and his mother.

In *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), the petitioner attempted to establish at trial the defense of "extreme emotional disturbance," by having a social worker read excerpts from several psychological evaluations of the petitioner

that had been made following a previous arrest. On cross-examination, the prosecutor attempted to rebut this defense by having the social worker read excerpts from another evaluation, which had been prepared by a psychiatrist on the joint motion of the petitioner and the prosecution following his arrest in the case at issue. The Supreme Court of Kentucky held that the petitioner had opened the door for the admission of the report by introducing earlier reports that were favorable to him and that the introduction of the latter report did not violate the petitioner's rights under *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).[1] The United States Supreme Court distinguished *Estelle v. Smith*, supra, noting that the trial court had ordered, sua sponte, the psychiatric examination in that case and that the petitioner had neither asserted an insanity defense nor offered any psychiatric evidence at trial. The Court further stated:

> "We thus acknowledge that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense.

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1. In *Estelle v. Smith*, supra, the prosecutor called a psychiatrist as the only witness in a capital sentencing hearing. The psychiatrist had examined the petitioner at the request of the trial judge, who had not notified defense counsel about the scope of the examination or apparently even the existence of the examination. Moreover, the petitioner had not placed at issue his competency to stand trial, nor had he offered an insanity defense. The United States Supreme Court held that the petitioner's Fifth Amendment rights were violated by the presentation of this testimony.

> "'When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant may be required to submit to a sanity examination conducted by the prosecutor's psychiatrist.' *[Estelle v. Smith],* at 465. [101 S.Ct. at 1874]

"We further noted: 'A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.' *Id.*, at 468 [101 S.Ct. at 1875]. This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."

Buchanan v. Kentucky, supra, at 422, 107 S.Ct. at 2917. The Court held that, under the facts of *Buchanan v. Kentucky*, supra, the introduction of the psychiatrist's report by the prosecution for the limited rebuttal purpose did not violate the Fifth Amendment. The Court further held that the introduction of the report did not violate the petitioner's Sixth Amendment right to the assistance of counsel, because defense counsel was on notice that he intended to put on a "mental status" defense for the petitioner and would therefore "have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Buchanan v. Kentucky*, supra, at 425, 107 S.Ct. at 2919. In so holding, the United States Supreme Court also stated, in a footnote, that the petitioner's deterrence argument was without merit. The appellant in the present case makes the same argument. The United States Supreme Court replied to this argument, stating:

> "Petitioner contends that, if the use of a pretrial psychological evaluation is allowed, as in this case, defense counsel will be reluctant to request competency evaluations, even if they believe that their clients are in need of one, or they may 'sandbag' the trial by raising the competency issue in a post-trial motion. . . . Moreover, petitioner argues that the rule requiring competency examinations when the trial judge has doubts about the defendant's mental condition, . . ., will be undermined by a decision in favor of the Commonwealth.

> "While we cannot foresee the tactics of defense counsel, we find somewhat curious petitioner's prediction and proposed solution. Where a competency examination is required . . . and where the defendant does not place his mental state at issue, the Fifth and Sixth Amendments would mandate that he be allowed to consult with counsel and be informed of his right to remain silent. We observed in *Smith* that if, after receiving such advice and warnings, a defendant expresses his desire to refuse to answer any questions, the examination can still proceed 'under the condition that the results would be applied solely for that purpose.' *[Estelle v. Smith,]* 451 U.S., at 468 [101 S.Ct. at 1875]. Thus, where a defendant does not make an issue of his mental condition, we fail to see how the decision today will undermine *Pate [v. Robinson,* 383 U.S. 375, 15 L.Ed.2d 815, 86 S.Ct. 836 (1966)]. Where, however, a defendant places his mental status at issue and thus relies upon reports of psychological examinations, he should expect that the results of such reports may be used by the prosecutor in rebuttal."

Buchanan v. Kentucky, supra, at 426, fn. 21, 107 S.Ct. at 1919, n.21.

The holding in *Ake v. Oklahoma,* supra, requires that, if a defendant makes a threshold showing that his sanity is likely to be a significant factor at trial, the State must provide access to a psychiatrist's assistance, if the defendant cannot otherwise afford one. In the

present case, the appellant was provided with psychiatric assistance; thus the principle of *Ake* was not violated. Moreover, because the appellant placed his mental status at issue by reading into evidence the earlier psychiatrist's report, the State could properly rebut this evidence by introducing evidence from the court-ordered psychiatric evaluation. *Buchanan v. Kentucky*, supra.

Although the appellant argues that he was entitled to additional psychiatric assistance to aid him in evaluating Dr. Goff's report, which was received prior to the trial court's sentencing, the requirements of *Ake v. Oklahoma*, supra, are met when the State provides the appellant with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine the appellant. There is no indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings. Moreover, the trial court indicated that it would have considered a motion to present an expert to evaluate this report. "Although additional psychiatric testimony might have been desirable . . . it was not required under the constitution." *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir. 1986).

III

The appellant argues that he was denied the effective assistance of counsel when the trial court refused to give his attorney any time to evaluate the use of the mitigating evidence of organic brain damage, which was disclosed to him "at the last moment."

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Despite the appellant's argument to the contrary, there is no indication in the record that the State interfered with the appellant's right to the effective assistance of counsel, by failing to produce all of his medical records from Holman Prison and all of his medical records from Taylor-Hardin Secure Medical Facility sufficiently in advance of his trial or sentencing hearing. The appellant argues that the medical records were not received until after the penalty stage of his trial before the jury and that this delay prejudiced his case. However, as the State argues, the record indicates that the appellant first requested a psychiatric examination by motion filed on January 21, 1985, which motion was granted on January 29, 1986. The psychiatric examination was conducted at Taylor-Hardin Secure Medical Facility over a period from April 2, 1986, to May 29, 1986. The resulting report was filed with the trial court on June 4, 1986, and copies were provided to defense counsel and the State. Defense counsel argues that the appellant filed a subpoena duces tecum, ordering representatives of Taylor-Hardin to produce medical records on June 18, 1986. On July 18, 1986, the appellant filed a motion to have Taylor-Hardin held in contempt for failing to comply. On July 21, 1986, the trial court ordered Taylor-Hardin to produce all its records relevant to the appellant, and this order was complied with on July 25, 1986. Thereafter, the appellant filed a petition to hold Taylor-Hardin in contempt for failing to produce the actual raw test data, and the trial court ordered these documents produced on July 31, 1986. The order was complied with on August 1, 1986. The appellant's trial began on August 20, 1986, and the jury returned with its verdict on August 27, 1986.

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Either prior to the trial or prior to the sentencing stage before the jury, which occurred on August 28, 1986, the appellant did not request a continuance to obtain further records. Following the penalty stage before the jury, on September 3, 1986, the appellant filed a motion to show cause, alleging that on August 13, 1986, he had served a subpoena duces tecum on Holman Prison requesting that his psychiatric records be produced and that Holman Prison had failed to comply. This subpoena does not appear in the record. On September 3, 1986, the trial court ordered Holman Prison to produce the psychiatric records before October 1, 1986, and also ordered the appellant's neuropsychological examination, which he had requested, and which was completed on October 3, 1986, with a report being filed on October 7, 1986. The appellant was subsequently sentenced on October 9, 1986.

We find no prejudice to the appellant on the basis of any alleged interference by the State, although there is some indication of delays in providing reports. It is clear from the appellant's own testimony during the penalty phase before the jury, that he had long been aware of his head injuries and that he had sought medical evaluation as to the possibility of any organic brain damage based thereon. As he testified, he had been told that he had none. Moreover, the lunacy commission found no indications of any organic brain damage.

Nor did the trial court err in denying the appellant's motion for a continuance in order for the appellant to have additional time to review the neuropsychologist's report and to consult with an expert about the report.

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"Applying the principles of the capital case of *Ex parte Hays*, 518 So.2d 768 (Ala. 1986), we find it extremely improbable that the additional time for preparation requested by the defendant would have changed the result of the trial and that the defendant has not met his burden of showing actual prejudice in the defense of the charge for which he was convicted. In *Hays*, our Supreme Court wrote:

> "'Hays contends that the trial court's denial of his motion for continuance, under the facts of this case, denied him his constitutional right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. The Court of Criminal Appeals rejected this argument because Hays failed to show any actual prejudice in the defense of his case as a result of the trial court's denial of his motion. We agree.
>
> "'The United States Supreme Court in *Morris v. Slappy*, 461 U.S. 1, 11-12, 75 L.Ed.2d 610, 619, 103 S.Ct. 1610, 1616 (1983), recognized that:
>
> "'Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's

> Sixth Amendment right to counsel. See *Chambers v. Maroney*, 399 U.S. 42, 53-54, 90 S.Ct. 1975, 1982-1983, 26 L.Ed.2d 419 (1970). Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to assistance of counsel. *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964).

"'*See also, Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L. Ed. 377 (1940); *Connor v. State*, 447 So.2d 860 (Ala.Cr.App.1984). Furthermore, it is evident from recent Supreme Court precedent that, although certain criteria such as the time provided for the investigation and preparation of the case, counsel's experience, the gravity of the charge and complexity of defenses, and counsel's accessibility to witnesses are relevant factors to consider

when evaluating effectiveness of counsel, the controlling analysis is whether the action prejudiced the accused in the defense of his or her case. *See United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The accused has the burden of proving prejudice by making a showing that he or she did not receive "a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668 [687], 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). As opined in *United States v. Cronic, supra*:

> "'"The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred."

"'466 U.S. at 656, 104 S.Ct. at 2045, 80 L.Ed.2d at 666.' *Hays*, supra, 518 So.2d at 771-72."

Fortenberry v. State, 545 So.2d 129, 139-40 (Ala. Cr.App.1988), affirmed, 545 So.2d 145 (Ala.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990).

In the present case, the appellant has demonstrated no prejudice by the trial court's denial of his motion for continuance. The trial court stated that it had reviewed the report and had found that, while the report indicates that there may have been some indication of organic brain dysfunction, the report also made continual references to the fact that the appellant appeared to be feigning or faking his problems during the examination.

IV

The appellant argues that his right against self-incrimination was violated by the prosecution's presentation of the testimony of the psychiatrist and psychologist who examined him. The appellant cites *Estelle v. Smith,* 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981), in support of his argument. However, this argument has been held to be without merit under similar circumstances in *Buchanan v. Kentucky,* 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987). See discussion at part II.

V

The appellant argues that he was denied his constitutional right to confront the authors of the victim impact statements, which were attached to the presentence report, in violation of *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The appellant argues that, even if the victim impact statements did not violate *Booth v. Maryland,* supra, they violated *Proffitt v. Wainwright,* 685 F.2d 1227 (11th Cir. 1982), cert. denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1985), in that

the appellant was not allowed the opportunity to cross-examine the authors of the victim impact statements.

The appellant's argument that the victim impact statements attached to the presentence investigative report, as well as the testimony of the victim's husband and photographs of the victim, were introduced in violation of *Booth v. Maryland*, supra, is without merit because the United States Supreme Court has recently overruled the applicable holding in *Booth v. Maryland*, supra, and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). See *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720. In *Payne v. Tennessee*, the victim impact statements included testimony by a family member of the victims and comments made by the prosecutor during his arguments to the jury. However, the United States Supreme Court noted that in *Booth v. Maryland*, a statute that required the presentence report in all felony cases to include a "victim impact statement" describing the effect of the crime on the victim and the victim's family was at issue. The court indicated that the source of these statements was not a distinguishing feature, stating:

> "Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. Evidence involved in the present case was not admitted pursuant to any such enactment, but its purpose and effect was much the same as if it had

> been. While the admission of this particular kind of evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin, this fact hardly renders it unconstitutional."

In overruling *Booth v. Maryland*, supra, the United States Supreme Court stated:

> "[W]hile virtually no limits are placed on the relevant mitigating evidence a Defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' *Mills v. Maryland*, 486 U.S., at 397, 108 S.Ct. 1860 at 1876, 100 L.Ed. 384 (1988)] (Rehnquist, C.J., dissenting), or demonstrating the loss of the victim's family and to society which have resulted from the defendant's homicide. *Booth* reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a '"mini-trial" on the victim's character.' *Booth*, supra [482 U.S.], at 506-507 [107 S.Ct. at 2534-2535]. In many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial. But even as to additional evidence admitted at the sentencing phase, the mere fact that for

tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of dilemma. As we explained in rejecting the contention that expert testimony on future dangerousness should be excluded from capital trials, 'the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.' *Barefoot v. Estelle*, 463 U.S. 880-898, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

". . . .

Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished.' *Blystone v. Pennsylvania*, 494 U.S. 299, 309, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth*

> Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of Fourteenth Amendment provides a mechanism for relief. See *Darden v. Wainwright*, 477 U.S. 168, 179-183, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)."

Payne v. Tennessee, supra, U.S. at 822-825, 111 S.Ct. at 2607-2608.

Moreover, the victim impact statements attached to the pre-sentence investigative report were not inadmissible as hearsay which denied the appellant his right to confrontation.

> "It is clear to this Court that the use of the presentencing report is consistent with Ala. Code 1975, § 13A-5-45(d), Alabama's capital murder statute, which states:
>
> > Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to

> rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama.

> "The entire report itself is an out-of-court statement and is entirely hearsay; however, it is admissible under Ala. Code 1975, § 13A-5-47. *Thompson v. State,* [503 So.2d 871 (Ala.Cr.App.1986), affirmed, 503 So.2d 887 (Ala.1987), cert. denied, 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987)]. The trial court is not obligated to do more than provide a fair opportunity for rebuttal; where the record indicates that the defendant was given sufficient opportunity to rebut any hearsay statements made at the sentencing hearing, there is no error. *Johnson v. State,* 399 So.2d 859 (Ala. Crim.App.1979), aff'd in part and rev'd on other grounds, 399 So.2d 873 (Ala.1981)."

Ex parte Davis, 569 So.2d 738, 741 (Ala.1990), cert. denied, 498 U.S. 1127, 111 S.Ct. 1091, 112 L.Ed.2d 1196 (1991). "No right to cross-examine was denied, as is contended. Appellant would have been entitled to call, as a witness, any person who could give information about the report, including its author, but apparently chose not to do so." *Haney v. State,* 603 So.2d 368 (Ala.Cr.App.1991).

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The evidence contained in the victim impact statements was relevant to this case, especially in light of *Payne v. Tennessee,* supra, and the defendant was given an opportunity to rebut the evidence. Therefore, there was no error. See *Thompson v. State,* supra; *Kuenzel v. State,* 577 So.2d 474 (Ala.Cr.App.1990), affirmed, 577 So.2d 531 (Ala.1991).

VI

The appellant argues that his rights to the presumption of innocence and the reliability of the sentencing trial were undermined when a guard provoked an argument with him in front of several jurors, while he was wearing handcuffs. The record indicates that, after the proceedings had ended on one day of the trial and the jury had been escorted out of the courtroom, a confrontation arose between the defendant and a guard who was to escort the defendant back to his cell. The confrontation apparently began in the courtroom and continued into the hall of the courthouse. The appellant was handcuffed by the guard while in they were in the courtroom and he was then led out into the hall, where words were apparently exchanged—possibly concerning the appellant's guilt or innocence. On the following morning, the jurors were individually questioned as to what they heard or saw concerning the incident, and whether anything they might have seen or heard would prejudice them against the appellant or the State in any way. Each juror who indicated any sort of awareness of the matter testified that he or she would not be prejudiced against the appellant or the State. Thus, the appellant suffered no actual prejudice.

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The appellant cites cases which warn against the prejudicial effect of allowing the jury to view a defendant in shackles or handcuffs during his trial. However, in light of the fact that few jurors polled stated that they saw the appellant in handcuffs, and that those that did stated that it would not prejudice them against the appellant, there was no error.

> "'All of the authorities we have studied are agreed that to bring a prisoner before the bar of justice in handcuffs or shackles, where there is no pretense of necessity, is inconsistent with our notion of a fair trial, for it creates in the minds of the jury a prejudice which will likely deter them from deciding the prisoner's fate impartially . . . .'

"Not to be overlooked, is the distinction made in *Clark [v. State,* 280 Ala. 493, 195 So.2d 786 (1967)], between handcuffing a prisoner in taking him to and from the court and in keeping him in handcuffs while he is being tried, unless there is reasonable ground for belief that such restraint is necessary to prevent his escape or his rescue.

> "'Furthermore, it is not ground for a mistrial that an accused felon appear in the presence of the jury in handcuffs when such appearance is only a part of going to and from the

> courtroom. This is not the same as keeping an accused in shackles and handcuffs while being tried. *Rhodes v. State*, 34 Ala.App.481, 41 So.2d 623.' [(1949)] *Evans v. State*, Ala.Cr.App., 338 So.2d 1033 [1976], cert. denied, 348 So.2d 784 (1977)."

Taylor v. State, 372 So.2d 387, 389 (Ala.Cr.App.1979). See also *Cushing v. State*, 455 So.2d 119, 121 (Ala.Cr.App.1984) ("[i]t is not ground for a mistrial that the accused appeared before the jury in handcuffs when this appearance was only a part of going to and from the courtroom"). *Campbell v. State*, 484 So.2d 1168, 1170 (Ala.Cr.App.1985) (wherein the court held that the trial court did not abuse its discretion by allowing the jury to see the defendant restrained in shackles where "[t]here is little doubt that the appellant here had substantial reason to attempt to escape, since he faced a sentence of life without parole . . ."). Under the circumstances of this case, and in light of the showing of no actual prejudice, we find no abuse of discretion by the trial court in allowing the appellant to be handcuffed for purposes of going to and from the courtroom.

VII

The appellant argues that the jury instructions concerning the especially heinous, atrocious, or cruel statutory aggravating circumstance violated the Eighth Amendment in that they were too vague to adequately guide the jury. He further argues that this aggravating circumstance was not supported by the facts.

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The record indicates that, in defining the aggravating circumstances which the jury could consider in arriving at its advisory verdict, the trial court charged:

> "'The capital offense was especially heinous, atrocious, or cruel, compared to other capital offenses.'
>
> "The term 'heinous' means especially wicked or shockingly evil. The term 'atrocious' means outrageously wicked and violent. The term 'cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense. For a capital offense to be especially cruel, it must be a consciousless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness, atrociousness or cruelty exceeds that which will always exist when a criminal capital case is committed."

These instructions were sufficient to overcome the vagueness condemned in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (wherein the United States Supreme Court held that the words "especially heinous, atrocious, or cruel," without more,

are unconstitutionally vague, as they fail to sufficiently inform juries of what they must find in order to impose the death penalty). See also *Lawhorn v. State*, 574 So.2d 970 (Ala.Cr.App.1990), affirmed, 581 So.2d 1179 (Ala.1991) (wherein the trial court gave the following instruction to the jury concerning this aggravating circumstance: "[a]nother one that you could consider but is not proven by your verdict is that the capital offense was especially heinous, atrocious, or cruel, compared with other capital offenses as set out in Subdivision 8 defining aggravating circumstances").

However, where sufficient guidance is given to the jury by the trial court's adequately defining the terms used so that the jury is made aware of what it must find in order to impose the death penalty, such an instruction is constitutionally acceptable. See *Proffitt v. Florida*, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In *Haney v. State*, 603 So.2d 368 (Ala.Cr.App.1991), the appellant challenged a jury instruction concerning this aggravating circumstance, which was similar to the one given in the present case, as unconstitutionally vague. That trial court instructed the jury as follows:

> "'The word "heinous" means extremely wicked or shockingly evil. The term "atrocious" means outrageously wicked and vile. The term "cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.

> "'What is intended to be included in this aggravating circumstance is those cases where the actual commission of a capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses.
>
> "'For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense. For a capital offense to be especially cruel, it must be [a] consciousless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious, and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness or atrociousness or cruelty exceeds that which [normally] exists when a capital offense is committed.'"

Id. at 385-386. This court held that these instructions met the constitutional standard and sufficiently overcame the vagueness prohibition of *Maynard v. Cartwright*, supra. This court held:

> "These instructions were proper and furnished adequate guidance to the jury. The court's instructions that this aggravating circumstance should apply to the consciousless or pitiless crime which is unnecessarily tortuous to the victim and one in which the brutality exceeds

> that which is normally present in any capital offense met the requirements of law. See *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981); *Hallford v. State*, 548 So.2d 526 (Ala.Cr.App.1988), aff'd, 548 So.2d 547 (Ala. 1989), cert. denied [493 U.S. 945], 110 S.Ct. 354 [107 L.Ed.2d 342] (1989)."

Haney, supra, at 386.

Moreover, the trial court properly instructed the jury on this aggravating circumstance because the evidence presented in this case was sufficient to show its existence. The trial court stated:

> "This finding is based upon the evidence of the execution type slaying of the victim, coupled with the number of times the victim was shot, after having been brutally raped and robbed, and done to eliminate an eyewitness to the rape and robbery."

The record indicates that the victim bled to death, after having been shot a number of times while she was standing and then lying on the floor, and after having been raped. Her death did not come for two hours after she had been shot. Witnesses testified that, as she clung to a mop in the back of the Austin's Convenience Store, she stated, "It just hurts so bad," and indicated that she "was burning," was "losing it," and that she was having great difficulty breathing. At the hospital, she begged

to see her husband and child because she knew she was going to die. The execution-type slaying in this case, the number of shots fired into the victim, and the nature of the victim's suffering all indicate that an instruction on this aggravating circumstance was appropriate. See, e.g., *Lawhorn*, supra ("[w]hen a defendant deliberately shoots a victim in the head in a calculated fashion, after the victim has already been rendered helpless by gunshots to the chest, such 'extremely wicked or shockingly evil' action may be characterized as especially heinous, atrocious, or cruel"). *White v. State*, supra ("[e]vidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was heinous, atrocious, and cruel").

VIII

The appellant argues that the jury's general verdict recommending the death penalty, without specifying whether any of the statutory aggravating circumstances were found, violated the Eighth Amendment, because it was not "rationally reviewable." However, jury specification of aggravating and mitigating circumstances is not constitutionally required. See *Bush v. State*, 431 So.2d 555, 559 (Ala.Cr.App.1982), affirmed, 431 So.2d 563 (Ala. 1983), cert. denied, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.175 (1983); *Morrison v. State*, 500 So.2d 36, 42 (Ala.Cr.App.1985), affirmed, 500 So.2d 57 (Ala. 1986), cert. denied, 481 U.S. 1007, 107 S.Ct. 1634, 95 L.Ed.2d 207 (1987); *Rutledge v. State*, 482 So.2d 1250, 1259 (Ala. Cr.App.1983), affirmed in pertinent part and reversed on

other grounds, 482 So.2d 1262 (Ala.1984); *Whisenhant v. State*, 482 So.2d 1225, 1239 (Ala.Cr.App.1982), affirmed in pertinent part and reversed on other grounds, 482 So.2d 1241 (Ala.1983), affirmed on remand, 482 So.2d 1246 (Ala. Cr.App.1983), reversed on other grounds, 482 So.2d 1247 (Ala.1984).

IX

The appellant argues that the trial court erred by denying his challenge for cause against a potential juror, W. G. G., without allowing him to effectively voir dire the juror about his ability to consider mitigating circumstances and to recommend a life sentence in this case. The record indicates that during the voir dire of the jury venire in this case, the defense counsel asked the following:

> "[DEFENSE COUNSEL]: . . . And if you find that the State has convinced you beyond a reasonable doubt and to a moral certainty that the Defendant, James McWilliams, is guilty of the things charged in this indictment, and no lesser offense—that is, he is guilty of a capital crime—if you have found him guilty of that crime, then, there would be a second hearing at which that same jury would hear evidence of aggravating and mitigating circumstances. Now, what I am asking is: If you were to serve on this jury, and if you and the 11 people who were on that jury with you were convinced beyond a reasonable doubt that James McWilliams was

guilty of a capital offense, is there any person who feels that automatically a death sentence should be imposed? That is, if he was guilty of a capital offense, then, the death penalty would be imposed? Is there anyone who feels that way? If there is, would you please stand?

"PROSPECTIVE JURORS: W.G.G.; T.W.

"THE COURT: [Defense counsel], since you have gone into that, perhaps you should also tell the jury the other punishment that is available.

"[DEFENSE COUNSEL]: I will get to that. Thank you, Judge.

"OTHER JURORS ALSO RESPONDING: R.B.; A.H.; M.S.; D.F.; J.S.; T.O.; C.S.; W.D.W.; M.F.; R.R.; M.B.; D.B.; W.F.; T.K.

"NO FURTHER RESPONSES.

"[DEFENSE COUNSEL]: Now, the law provides for only two punishments if the Defendant is found guilty. And that is a sentence of death or a sentence of life in prison without parole. Those would be the only two sentences available, if that Defendant is convicted of the capital crime as charged in the indictment. Those of you who stood up and said that you believed that if he was guilty of this crime, he should receive a death sentence—those of you

who said that—would the fact that you had an alternative of a sentence of life without parole, affect your decision? That is, could you give him life without parole if you were convinced, along with 11 others on the jury, that he was guilty of a capital offense? If you could, those of you who stood up would you stand up again?

"PROSPECTIVE JURORS: W.G.G.

"[DEFENSE COUNSEL]: Mr. G:, would you consider that an alternative punishment?

"JUROR GRAMMER: Yes, sir."

Thereafter, several potential jurors were individually voir dired, among them W.G.G. During that questioning, the following occurred when W.G.G. was being examined by the prosecutor:

"[PROSECUTOR]: Mr. G., earlier you were asked the question that if you were serving on the jury and you reached a decision, along with the other members of the jury, that the Defendant was guilty of capital murder, and you indicated that you would impose the death penalty. Let me ask you this: Although in a given case, in this case you might ultimately arrive at your final decision: that being the death penalty, would you consider the evidence, and consider both life without parole and the death penalty before reaching your final decision?

"[W.G.G.]: Yes, sir.

"Q: All right. I believe that's all.

"RE-EXAMINATION BY [DEFENSE COUNSEL]:

"Q: Mr. G., if you and the 11 other jurors found the Defendant guilty of a capital offense: that is, you found in this case, James McWilliams had done what you were talking about that he had been through, shot the girl during the robbery and whatever else the proof might be, 'being so bold,' as you would still be able to consider mitigating circumstances and recommend a sentence of life without parole?

"[PROSECUTOR]: We object, Your Honor.

"THE COURT: Sustained.

"Q: Would you be able to recommend a life sentence without parole, as opposed to the death sentence, if you had already found him guilty beyond a reasonable doubt of the things that are alleged in this case?

"[PROSECUTOR]: It is not whether he would recommend that, but whether he would consider the two alternatives?

"THE COURT: Sustained.

"Q: I will accept Your Honor's ruling, and stay on my question. I will stand with the question.

"THE COURT: I don't think so. You are asking him to decide it now.

"[DEFENSE COUNSEL]: I am asking a hypothetical question, if he found the defendant guilty, if he were convinced beyond a reasonable doubt that he had done the things alleged in this indictment that you have heard about, and that we have talked about, are you saying that you could consider mitigating circumstances and recommend a sentence of life without parole? Or do you feel that you would have to recommend the death sentence?

"[PROSECUTOR]: We object on the same grounds. The question is not answerable.

"THE COURT: Sustained.

"[DEFENSE COUNSEL]: We'll except to Your Honor's ruling that we are asking the jury to pre-judge the evidence. I am asking him to pre-judge on a finding of guilt here, Mr. G. There would be 2 punishments available. Can you consider both of them?

"THE WITNESS: Yes, I could.

"Q: I have no further questions."

Thereafter, the defense counsel challenged W.G.G. for cause, stating that he should be able to ask the witness a hypothetical question. The trial court denied the challenge.

This potential juror clearly indicated that he could consider a sentence of life without parole, as well as a death sentence, and that his views on the death penalty would not prevent or substantially impair his duties as a juror. Therefore, the trial court did not abuse his discretion in denying the challenge for cause.

> "The proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment is 'whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." '*Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *Gray v. Mississippi,* 481 U.S. 648, 107 S.Ct. 2045, 2051, 95 L.Ed.2d 622 (1987). 'The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath notwithstanding his views on capital punishment.' *Dutton v. Brown,* 812 F.2d 593, 595 (10th Cir.), cert. denied, *Dutton v. Maynard,* 484 U.S. 836, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987). A juror's bias need not be proved with 'unmistakable clarity' because 'juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.' *Id.*

> "A trial judge's finding on whether or not a particular juror is biased 'is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.' *Witt,* 469 U.S. at 429, 105 S.Ct. at 855. That finding must be accorded proper deference on appeal. *Id.* 'A trial court's rulings on challenges for cause based on bias [are] entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion.' *Nobis v. State,* 401 So.2d 191, 198 (Ala.Cr.App.), cert. denied, *Ex parte Nobis,* 401 So.2d 204 (Ala.1981)."

Martin v. State, 548 So.2d 488, 490-91 (Ala.Cr.App.1988), affirmed, 548 So.2d 496 (Ala. 1989), cert. denied, 493 U.S. 970, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989).

Moreover, the trial court did not err in "limiting" the defense counsel's ability to question the potential juror on voir dire.

> "'In the process of selecting the jury from the venire afforded, each party has the right to have questions formulated by it propounded to the jury, either by the court or by the party as the court may determine, if such questions reasonably relate under the circumstances to the question of the qualification or interest or bias on the part of prospective jurors." *Griffin v. State,* 383 So.2d 873, 876 (Ala.Cr.App.), cert. denied, 383 So.2d 880 (Ala.1980), quoted with

> approval in *Alabama Power Co. v. Bonner*, 459 So.2d 827, 833 (Ala. 1984).'
>
> "*Heath v. State*, 480 So.2d 26, 28 (Ala. Cr.App.1985). It is well settled that the trial court has discretion regarding how the voir dire examination of the jury venire will be conducted, and that reversal can be predicated only upon an abuse of that discretion. *Ervin v. State*, 399 So.2d 894 (Ala.Cr.App.), cert. denied, 399 So.2d 899 (Ala. 1981); *Peoples v. State*, 375 So.2d 561 (Ala.Cr.App.1979)."

Bui v. State, 551 So.2d 1094, 1110 (Ala.Cr.App.1988), affirmed, 551 So.2d 1125 (Ala.1989), vacated on other grounds, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991).

In the present case, the trial court sustained the prosecutor's objection on the ground that the formulation of defense counsel's questions required the potential juror to decide which sentencing alternative he would choose if he found this appellant guilty. The defense counsel was allowed to elicit from the potential juror whether he would consider a sentence of life imprisonment without parole. Therefore, we find no abuse of discretion by the trial court.

X

The appellant argues that the prosecutor undermined the reliability of the jury's advisory verdict because of comments made during his closing argument in the

penalty phase before the jury. The appellant cites seven different instances of alleged improper prosecutorial comment.

The first comment by the prosecutor concerned the aggravating circumstances which he claimed to be applicable to the case. He stated that among these circumstances he expected that the trial court would charge "that the capital offense was committed by a person under sentence of imprisonment." He further stated that evidence had been presented that the appellant had been previously convicted on two occasions. The defense counsel objected, noting that "the courts have interpreted that as being a person who was in prison at the time the crime was committed." The trial court sustained defense counsel's objection. The prosecutor then acknowledged, "I am incorrect: the first one [above-quoted aggravating circumstance] is not the applicable one." The appellant did not request a curative instruction and none was given. Thereafter, during its oral charge to the jury, the trial court instructed the jury on the aggravating circumstances which could properly be considered. "'The general rule is that prejudicial statements, even though improper, are considered capable of being eradicated by the trial court in sustaining objections thereto or by appropriate instructions to the jury or both. *Meredith v. State*, 370 So.2d 1075 (Ala.Crim.App.), *cert. denied*, 370 So.2d 1079 (Ala.1979).' *Bui v. State*, 551 So.2d 1094 (Ala. Crim App.1988)." *Holladay v. State*, 549 So.2d 122, 131 (Ala.Cr.App.1988), affirmed, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989).

Appendix E

The appellant also cites a comment made by the prosecutor as he was addressing the applicability of each statutory mitigating circumstance to this case. The prosecutor stated:

> "Two, the capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance. He has a mental problem in this sense: that he has a mind which is just criminal. He is just bad. What else can you say? He is a dangerous man, and he has proven it."

The appellant argues that, by this comment, the prosecutor argued that the jury could not consider his alleged psychiatric problems. However, it is clear that the prosecutor was arguing that the statutory mitigating circumstance that "the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance," did not apply to the facts and evidence presented in this case.

The appellant argues that the prosecutor's argument suggested that only statutory mitigating circumstances could be considered by the jury. The appellant bases his argument on the fact that the prosecutor listed the statutory mitigating circumstances and commented on each one. However, in *Bankhead v. State,* 585 So.2d 97 (Ala.Cr.App.1989), the prosecutor raised the same argument. This court found no impropriety in the fact that "in closing argument, the State went down the list of statutory mitigating circumstances, contending that none of these applied." *Bankhead,* supra, at 107.

Appendix E

The record further indicates that following the prosecutor's listing of the statutory mitigating circumstances the defense counsel objected on the basis that the list of statutory circumstances was not inclusive and that other circumstances may be considered. The trial court responded, "Counsel has the right to argue the law, but the Court will be the final authority on the law." The trial court then sustained the appellant's objection. The action of the trial court eradicated any error. See *Holladay,* supra, at 131, and cases cited therein. Moreover, during his oral charge to the jury, the trial court clearly instructed the jury that nonstatutory mitigating circumstances were to be considered by the jury, as well as the statutory mitigating circumstances. The trial court listed and described the pertinent nonstatutory mitigating circumstances.

The appellant also cites as error the following prosecutorial argument:

> "Let me comment on the reasons for penalties, as I see it, or as I think all of you would agree. One reason is to rehabilitate somebody, to change their behavior and make them a good citizen. Is rehabilitation applicable in this case? I submit to you no, it is not. Another one is retribution, just punishment. And I think that society has a need to feel that when a man does the horrible crime that this man has committed, that people out there need to feel and know that the system works, and that the man has been punished to the degree that he can be punished in our society, which, in this

> case, is the maximum sentence. Another one is deterrent: that is, to deter—in other words, the punishment that might be applied to one defendant hopefully will deter others from thinking about committing the same kind of crime. Isn't that applicable in this case?"

Deterrence, retribution, and society's right to self-defense have all been held to be proper subjects of prosecutorial argument. See, e.g., *Rutledge v. State,* 523 So.2d 1087, 1100 (Ala.Cr.App.1987), reversed on other grounds, 523 So.2d 1118 (Ala.1988) ("[i]t is proper to argue deterrence in a sentencing phase closing argument"). *Holladay v. State,* 549 So.2d 122, 131 (Ala.Cr.App.1988), affirmed, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989) (retribution argument was held proper). *Kuenzel v. State,* supra (argument concerning society's right of self-defense was held proper).

The appellant cites as error the following statements made by the prosecutor:

> "Then when he had satisfied that animal lust of his and reached an ejaculation, that is how that happened to be on her slacks. . . . I am suggesting to you that it is your duty, your obligation under the facts of the evidence in this case, to do that: to carry out your job as it should be done because we have to cut out a cancer sometimes."

As to the prosecutor's reference to the appellant's "animal lust":

> "'The prosecutor's statements are not evidence. *Henry v. State,* 468 So.2d 896, 899 (Ala.Cr.App.1984), *cert. denied,* 468 So.2d 902 (Ala.1985). Further, prosecutors are to be allowed a wide latitude in their exhortations to the jury. *Varner v. State,* 418 So.2d 961 (Ala.Cr.App.1982). "Statements of counsel and argument must be viewed as in the heat of debate and must be valued at their true worth rather than as factors in the formation of the verdict." *Orr v. State,* 462 So.2d 1013, 1016 (Ala.Cr.App.1984).'

"*Armstrong v. State,* 516 So.2d 806, 809 (Ala.Cr.App.1986). Furthermore, '[t]he trial judge can best determine when discussion by counsel is legitimate and when it degenerates into abuse. *Garrett v. State,* 268 Ala. 299, 105 So.2d 541 (1958); *Hurst v. State,* 397 So.2d 203 (Ala.Crim.App.), cert. denied, 397 So.2d 208 (Ala.1981).' *Henderson v. State,* 460 So.2d 331, 333 (Ala.Cr.App.1984).

". . .'[A] prosecutor as well as defense counsel has a right to present his impressions from the evidence,' and '[h]e may argue every legitimate inference from the evidence and may examine,

> collate, sift, and treat the evidence in his own way.' *Watson v. State,* 398 So.2d 320, 328 (Ala. Cr.App.1980), writ. denied, 398 So.2d 332 (Ala. 1981), cert. denied, 452 U.S. 941, 101 S.Ct. 3085, 69 L.Ed.2d 955 (1981)."

Henderson v. State, 584 So.2d 841, 856 (Ala.Cr.App.1989), remanded, 584 So.2d 862 (Ala.), affirmed, 587 So.2d 1071 (Ala.Cr.App.1991).

As to the prosecutor's reference to the appellant as a "cancer that needed to be 'cut out' of society, "the law is clear that '[i]n a proper case, the prosecuting attorney may characterize the accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with the evidence of the case.'" *Pierce v. State,* 576 So.2d 236 (Ala.Cr.App.1990), cert. denied, 576 So.2d 258 (Ala. 1991), quoting *Nicks v. State,* 521 So.2d 1018, 1023 (Ala.Cr.App.1987), affirmed, 521 So.2d 1035 (Ala.), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 948 (1988).

The appellant contends that the prosecutor erred in arguing that the victim was raped from behind, because, he argues, this fact was not supported by facts introduced into evidence. However, there was evidence that there was semen found on certain places on her slacks, which were still around her lower legs when she was found. Thus, this argument was proper as a reasonable inference to be drawn from the evidence. See *Henderson v. State,* supra.

The appellant cites three instances in which he claims that the prosecutor injected his personal opinion into the closing argument. The appellant appears to be referring to the prosecutor's comments that society needed protection and that the evidence presented concerning the appellant's mental state indicated not that he was mentally ill, but rather that he was simply mean. This argument was based on the report from the lunacy commission stating that the appellant did not have a mental defect, but rather had a character defect and repercussions from that defect. While it is never proper for the prosecutor to express his personal opinion as to the guilt of the accused during closing argument, reversible error does not occur when the argument complained of constituted mere expression of opinion concerning inferences, deductions and conclusions drawn from the evidence.' *Sams v. State,* 506 So.2d 1027, 1029 (Ala.Cr.App.1986)." *Henderson v. State,* supra.

In reviewing claims of improper prosecutorial argument, comments made by the prosecutor must be examined in the context of the entire trial. *Duren v. State,* 590 So.2d 360 (Ala.Cr.App.1990). "In judging a prosecutor's closing argument, the standard is whether the argument 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464 [2471], 91 L.Ed.2d 144 (1986), quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1975)." *Bankhead v. State,* 585 So.2d 97 (Ala. Cr.App.1989). We find no denial of due process resulting from the prosecutor's comments during his closing statement, nor do we find any error in those comments.

Appendix E

XI

The appellant argues that he was denied his rights to due process by the trial court's refusal to instruct the jury on a lesser included offense of felony murder, because he argues that a rational jury could have found that the robbery was committed by two men and that the appellant was not the triggerman or an accomplice to the murder. However, the evidence presented at trial clearly indicates that the appellant was not entitled to such a charge. There was no reasonable theory which could have been drawn from the evidence to support the appellant's contention that the jury might have concluded that there were two men involved. The appellant bases his argument on the fact that certain of the identifications given by witnesses varied and did not perfectly match the appellant. However, each of these witnesses positively identified the appellant as the man they saw at the time of the offense. The appellant was identified as the man present during the offense; he was found with the murder weapon in his possession; and the victim's dying declarations clearly indicated that there was only one man involved.[2]

> "In *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the United States Supreme Court held that the sentence of death could not be imposed after a jury verdict of guilt of a capital offense when the jury was precluded

2. There was testimony that, after the victim was found, she stated repeatedly that she did everything that the "son of a bitch" wanted, but that he still shot her. Her statements made at the hospital similarly only indicated one perpetrator.

> from considering a verdict of guilt of a lesser included non-capital offense, provided that the evidence would have supported such a verdict. Subsequently, in *Hopper v. Evans*, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1981), the Supreme Court clarified its decision in *Beck, supra*, to require that only when the evidence warrants such an instruction must a lesser included offense instruction be given. In so holding, the Court upheld the constitutionality of the following Alabama standard as applied in capital cases: 'a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position."' *Hopper*, 456 U.S. at 611, 102 S.Ct. at 2053 (quoting *Fulghum v. State*, 291 Ala. 71, 75, 277 So.2d 886, 890 (1973))."

Ex parte Julius, 455 So.2d 984, 986 (Ala. 1984), cert. denied, 469 U.S. 1132, 105 S.Ct. 817, 83 L.Ed.2d 809 (1985). The appellant was not entitled to a charge on felony murder because there was no reasonable theory from the evidence which would have supported such a charge.

XII

The appellant argues that the prosecutor used inadmissible hearsay testimony concerning Jerry Porter's alibi to disprove the defense theory that the appellant was mistakenly identified as the killer. The record indicates that, shortly following the offense, the police received

information incriminating Jerry Porter in the instant offense. Thereafter two of the witnesses to the offense "tentatively identified" Jerry Porter as the man they had seen at the scene of the offense. During the trial, on cross-examination of State's witness Officer Robert McFerrin, the defense counsel asked about any information which had been received regarding Jerry Porter. McFerrin testified that he had received information from an informant that Jerry Porter was seen in the vicinity of Austin's Food Store at approximately 10:00 p.m. on the night of the offense. The informant described Porter as wearing khaki pants, a brown coat, and a white shirt; this description apparently matched the description of the killer which had been run in the local newspaper following the murder. The informant further stated that Porter was carrying a sack of coins and paper money on that night.

On redirect examination, the prosecutor asked Officer McFerrin why no charges had ever been brought against Jerry Porter, and the witness testified that the police discovered that the informant was Porter's ex-girlfriend, who later admitted that she had lied about the identification in order "to get even" with Porter. Officer McFerrin testified that, after investigating Porter, they discovered that he had been in Sylacauga on the night of the murder.

Although the appellant argues that Officer McFerrin's testimony on redirect examination concerning the recanting of the informant's identification of Porter, violated his right of confrontation and was inadmissible hearsay, we note that the appellant "opened the door" for

the introduction of this testimony by eliciting testimony from Officer McFerrin as to what the informant had told him concerning Jerry Porter. See *Ringer v. State,* 489 So.2d 646, 652 (Ala.Cr.App.1986); *Loyd v. State,* 580 So.2d 1370 (Ala.Cr.App.1990), reversed on other grounds, 580 So.2d 1374 (Ala.1991); *Hollingsworth v. State,* 549 So.2d 110 (Ala.Cr.App.1988); *Campbell v. State,* 508 So.2d 1186 (Ala.Cr.App.1986). See also *Garrett v. State,* 580 So.2d 58 (Ala.Cr.App.1991) ("[t]he record reveals that the appellant opened these matters up during cross-examination; therefore, they were properly within the scope of the State's re-direct examination").

Moreover, the appellant failed to object to this testimony at trial and, even if the testimony was hearsay, its admission does not rise to the level of plain error as defined by Rule 45A, A.R.App.P. See *Ex parte Womack,* 435 So.2d 766, 769 (Ala.1983), cert. denied, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983); *Ex parte Harrell,* 470 So.2d 1309, 1313 (Ala.1985), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985); *Ex parte Watkins,* 509 So.2d 1074 (Ala.1987), cert. denied, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

XIII

The appellant argues that he was denied a fair trial by the prosecutor's impeachment of the appellant's wife, Sonya Smith McWilliams, through an incriminating prior inconsistent statement, without producing the witness to whom the statement was allegedly made. The record indicates that the appellant, his pregnant wife, and their

child were staying in the apartment of Cynthia Love at the time of the offense. Cynthia Love had been a good friend of the appellant's wife. On cross-examination of the appellant's wife, the following occurred:

> "[PROSECUTOR]: Now, there at the time when you returned the key, I will ask you at that time and place, if you would have made this statement to [Cynthia Love]: that you were on the telephone across from the apartment, and that James [the appellant] went across the street to Austin's Convenience Store. Did you make that statement to Cynthia Love there at that time and place?
>
> "[APPELLANT'S WIFE]: No, I did not."

The appellant did not object to this remark, but later made a motion for mistrial based on the prosecutor's question. The prosecutor submitted that Cynthia Love had been subpoenaed as a State's witness and that she had been reliable in the past. The prosecutor testified that Cynthia Love never appeared to testify and therefore was never called to impeach the appellant's wife. The trial court subsequently instructed the jury as follows:

> "Before we begin the arguments of counsel, ladies and gentlemen, I want to give you this instruction: the State has attempted to impeach Sonya Smith McWilliams [the appellant's wife] by showing prior inconsistent statements made to Cynthia Love. Cynthia Love has

not testified to those statements, and thus Sonya McWilliams has not been successfully impeached. I instruct you ladies and gentlemen that you cannot consider statements allegedly made to Cynthia Love and denied by Sonya Smith McWilliams in weighing the credibility of Sonya McWilliams."

"It is generally agreed that, when a witness is called to testify to a material issue in the case, the party against whom the witness is called may impeach his credibility by proving that he has previously made statements that are inconsistent with his present testimony. These prior statements of self-contradiction can be introduced either through the cross-examination of the witness or, under limiting rules . . . by introducing other witnesses who will testify to the inconsistent statement."

C. Gamble, *McElroy's Alabama Evidence*, § 155.02(1) (4th ed. 1991).

"When a witness, on cross-examination, denies that he made a statement out of court which is inconsistent with his testimony on direct examination, the only available move for the impeaching party is to bring on an impeaching witness who can testify as to the prior inconsistent statement of the witness being impeached."

C. Gamble, *McElroy's Alabama Evidence,* § 157.01(1) (4th ed. 1991). Although the prosecution laid a proper predicate for the impeachment of the appellant's wife through her prior inconsistent statements made to another witness, because the other witness (Cynthia Love) never testified, the appellant's wife was never impeached.

Moreover, the prosecutor's testimony at trial establishes that he intended to produce the testimony of Cynthia Love. The following transpired following the defense counsel's motion for mistrial:

> "[PROSECUTOR]: The witness obviously is not available, Judge, but I was assured last night—I talked to two people, both of whom claimed to be the mother of Cynthia Love. I think I determined which one was the correct one, and that one told me that she felt very certain that she would be able to have Cynthia here this morning at 9:00. I assured her that we would try to pay her expenses or whatever. There is no way I could know whether she was going to appear here or not. Now, she obviously did not appear. I don't know where she is; she was under subpoena.
>
> "[ASSISTANT PROSECUTOR]: And our impeaching of her was just not done arbitrarily, Your Honor. We had had a statement taken by Ms. Cynthia Love; we have been in contact with Ms. Love, and Ms. Love has been here, was under subpoena, and told that we may need

> her in rebuttal on these particular facts that were brought out in court. And we did have statements and the things that were offered in impeachment of Mrs. Sonya Smith McWilliams [were] done in good faith. And our witness just didn't pan out, just didn't show up."

"It is becoming increasingly clear that one does not have an unbridled and absolute right to ask about a prior inconsistent statement. Rather, the cross-examiner must have some reasonable grounds and good faith upon which to believe that such a statement was in fact made." C. Gamble, *McElroy's Alabama Evidence,* § 156.01(7) (4th ed. 1991), citing *Wysinger v. State,* 448 So.2d 435 (Ala. Cr.App.1983).

Because of Cynthia Love's unavailability, the appellant's wife was not impeached. Also, because she denied having made the statement, any possible prejudice to the appellant was lessened. Moreover, because the prosecutor provided evidence that he undertook the impeachment in good faith and that he had reasonable grounds to believe that Cynthia Love would be present to testify as to the prior inconsistent statement, and also, in light of the trial court's instructions to the jury, we find no prejudice to the appellant as a result of the prosecutor's statements.

XIV

The appellant argues that the trial court interfered with his right to confront his accusers because he was not

allowed to impeach an inmate informant by questioning him about his decision to cooperate with the authorities in this case. Two inmates who had been incarcerated with the appellant following his apprehension in Ohio testified for the State, concerning statements which the appellant had allegedly made to them while he was in prison. One of the witnesses, Ronnie Hands, testified on cross-examination as follows:

> "When you talked to Investigator Helm and told him you didn't know anything, and you went back and talked to Anthony Finn [the other inmate] did you tell Anthony Finn what they wanted?
>
> "A. I just told him they was asking questions about him.
>
> "Q. About [the appellant]?
>
> "A. Yeah.
>
> "Q. You told Anthony Finn that?
>
> "A. Yeah.
>
> "Q. What else did you tell him?
>
> "A. That's it.
>
> "Q. Did Anthony say he was going to talk to somebody?

"A. He didn't say.

"Q. You and Anthony didn't talk?

"A. Probably. Not really, no.

"Q. And you knew that [the appellant] had come from Alabama? Right?

"A. Well, I didn't know until he told me.

"Q. Well, he told you he had come from Alabama? Right?

"A. Yeah.

"Q. And you got all this information from [the appellant]? Right: that you have testified to?

"A. Yeah.

"Q. And you didn't get any of it from Anthony Finn?

"A. No.

"Q. And you and Anthony Finn never talked about what was said by [the appellant]?

"A. No.

"Q. You never compared notes about what you knew?

"A. No."

Thereafter, on cross-examination of the other inmate, Anthony Finn, who actually shared a cell with the appellant, the following transpired:

> "Q. Did you have occasion to talk with Ronnie Hands about the prosecution wanting some information about [the appellant]?
>
> "A. Yes.
>
> "Q. And when you talked to him, what did he tell you?
>
> "[PROSECUTOR]: We object to hearsay, Your Honor.
>
> "THE COURT: Sustained.
>
> "[DEFENSE COUNSEL]: Your Honor, Mr. Hands testified he never had a conversation.
>
> "[PROSECUTOR]: No, he didn't. He said he did talk to him, Your Honor, and we would object to the nature of any content of any conversation as hearsay.
>
> "[DEFENSE COUNSEL]: Judge, how am I supposed to impeach Mr. Hands, if I don't know what they said?

"THE COURT: I will sustain.

"[DEFENSE COUNSEL]: We except, Your Honor."

The appellant argues that there was evidence that both inmates received lighter sentences because of their cooperation in this case and that, through this questioning, the appellant sought to produce evidence that the two inmates had fabricated their stories so as to receive this beneficial treatment. The appellant argues that the trial court's sustaining of the prosecutor's hearsay objection limited his ability to impeach the inmates. The appellant also argues that the alleged conversation was not hearsay because it was offered for the purpose of impeachment. However, the record indicates that immediately following the trial court's sustaining of the prosecutor's objection and the defense counsel's exception to the trial court's ruling, defense counsel was allowed to ask the following:

"Q. Did you ever talk to Ronnie Hands about the things that [the appellant] said to you or to him?

"A. No.

"Q. You never talked to him about that.

"A. No."

Thus, the defense counsel was allowed to rephrase his question so that it was not as broad, and he received an answer to his question. Therefore, even if the hearsay

testimony should have been allowed for the limited purpose of impeachment, any error was harmless, because the defense counsel was allowed to elicit an answer concerning this question. See *Walker v. State*, 581 So.2d 570 (Ala. Cr.App.1991) (wherein defense counsel's question, which was preliminary step to impeachment, should have been admitted; however, the error was harmless). Moreover, based on the defense counsel's formulation of the initial question we do not find that the trial court abused its discretion in sustaining the prosecutor's objection. See C. Gamble, *McElroy's Alabama Evidence* § 21.01(1) (3), (4th ed. 1991).

XV

The appellant argues that the trial court denied the appellant the effective assistance of counsel by overruling an objection to the testimony of prison inmates concerning the appellant's confession, without determining whether the inmates were agents of the State. There is no indication in the record that either inmate was working as an agent of the police. There was further evidence that none of the Alabama officials had promised the inmates anything in return for their testimony. However, there was an indication that certain charges were lessened or dropped against these inmates by the Ohio officials in return for their testimony. The record indicates that these arrangements were made after the appellant had been transferred and after he had made the confessions to the inmates.

Appendix E

During the testimony of one of the inmates, defense counsel objected, citing *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Although the trial court overruled the objection, the prosecutor subsequently asked the inmate whether he had coerced or threatened the appellant or had promised anything in return for making this confession. The inmate stated that he had not.

> "'[W]hen an accused volunteers a confession to a person who is not a law enforcement official or agent and has no connection whatever with law enforcement authorities, who has no interest whatever in the prosecution of the accused, is not in a position to promise or give the accused anything to compensate for his confession or to harm him for not making a confession, and there was no occasion whatever on the part of the person to whom the confession was made to have threatened the defendant if he did not confess or to make him any promise if he did confess, the confession under such circumstances is voluntary and admissible in evidence. *Ellis v. State*, Ala.Cr.App., 338 So.2d 428, 432 (1976); *Kircheis v. State*, 56 Ala.App. 526, 323 So.2d 412 (1975), *cert. denied*, 295 Ala. 409, 323 So.2d 421.'

"*Primm v. State,* 473 So.2d 547, 553 (Ala.Cr.App.1984). See also *Warrick v. State,* 460 So.2d 320, 323 (Ala. Cr.App.1984); *Hinshaw v. State,* 398 So.2d 762, 764 (Ala. Cr.App.), *cert. denied,* 398 So.2d 766 (Ala. 1981)."

Jackson v. State, 502 So.2d 858, 862 (Ala.Cr.App.1986).

Because the statement was voluntarily made to persons who were not law enforcement officers or agents, the appellant was not entitled to counsel or constitutional warnings prior to making his statement. *McCall v. State,* 501 So.2d 496, 500 (Ala.Cr.App.1986); *Jackson v. State,* supra, and cases cited therein.

XVI

The appellant argues that he was denied a fair trial because of improper comments made by the prosecutor during his closing argument at the guilt phase. The appellant refers to the following arguments made by the prosecutor:

> "I can assure you, I believe all of us in this room believe that this is real, and the gun in this case, which you have seen, that is real; the slacks which you have seen, that's real, showing the evidence of the semen—that's real; the only thing that is not real here today is Patricia Vallery Reynolds. She is, unfortunately, not here today, our best witness. The only evidence we have of her is her clothing, her key chain, and that picture (indicating). I wish she were

here today with her family, and could testify about what happened. But she is not, and that is why we are here."

"Both of them talk about, they keep saying that our witnesses picked out Jerry Porter, and that they identified Jerry Porter. That's not correct, now, and you heard the evidence. They said it looked like him, but none of them said it was him: not a single one of them. They all said yes, that looked very much like him. And when you—

"[DEFENSE COUNSEL]: I am going to object to that as a misstatement of the evidence. The evidence was that they—the testimony was that they tentatively identified him as the one who was in the store. That was exactly what the officer testified to concerning Mr. McDaniel.

"THE COURT: The jury is aware of the evidence. I will note your objection."

"[PROSECUTOR]: Now, [Defense Counsel] attacked our witnesses: Marsh, Thomas. He talked about the Porter case, and the friends supposedly alibiing. The Tuscaloosa County Homicide Unit investigated that case thoroughly, and they concluded conclusively that that man had nothing to do with it.

"[DEFENSE COUNSEL]: I am going to object. There's no evidence of any conclusive determination by any homicide investigation.

"THE COURT: I will note your objection.

"[DEFENSE COUNSEL]: Could I have a ruling?

"THE COURT: Overruled."

"[PROSECUTOR]: He was going north. Why? Because he was fleeing from the crime; it looked like things were focusing in on him; he was not supposed to have been a suspect until Investigator Rester's card turns up on his door. And he is afraid that now he is a suspect. And the brown coat, he said, 'where is it?' Well, of course, we know that Trooper Elder didn't take the clothing he was wearing. It was cold up in Ohio in January, so he got his clothes back. He had to have gotten those.

"[DEFENSE COUNSEL]: I am going to object to that as not being a correct statement of the evidence, Your Honor.

> "THE COURT: Again, the Court doesn't make rulings on the evidence. That is up to the jurors."

> "[PROSECUTOR]: And as to what happened to the khaki pants, I don't know. But I suspect they had blood on them. I suspect that he got rid of them."

"All right, sir. And of course as far as printing the gun, this Defendant wasn't even a suspect for several weeks. They didn't know to print the gun. I think it was obvious that Sonya intended to be misleading and untruthful. And that's why I cross-examined her about what she could see from that phone to the apartment. She was trying to tell you that she was there on the phone and could see the door the whole time, and that she could have seen him come and go. But when I showed her obvious physical evidence, she admitted that she was not correct. And as for what Sonya told Chief Miller as to when this Defendant had the gun in Mobile, they were talking about in context of this crime, and—

"[DEFENSE COUNSEL]: Your Honor, I am going to object again. There is no evidence as to when that reference was to. I specifically asked Investigator Miller; he said there was no way he knew. I object; that is a misstatement of the evidence.

"[PROSECUTOR]: It is a fair inference.

"THE COURT: The jury is aware of the evidence."

The above-quoted prosecutorial comments were proper inferences or conclusions drawn from the evidence. The prosecutor could properly conclude the victim was dead, that Jerry Porter was never positively identified, that the information pertaining to Jerry Porter had been investigated and that the police had determined that Porter was in Sylacauga on the night of the murder, that the appellant might have gotten rid of the khaki pants and brown coat which he was seen wearing on the night of the offense, and that the appellant's wife was untruthful in testifying that she was able to see the apartment from the telephone booth.

"[PROSECUTOR]: He talked about the fingerprints. You know I didn't hear any mention of Jerry Porter's fingerprints in that story either. You heard the officers say that they rarely ever are able to get prints in a robbery. Certainly they are going to have a lot of prints because people work there day in and day out.

"[DEFENSE COUNSEL]: Your Honor, I object to that as misleading the jury. There is no evidence Jerry Porter's fingerprints were ever sent for comparison.

"THE COURT: Sustained."

Appendix E

As to the prosecutor's comment concerning the lack of evidence of any of Jerry Porter's fingerprints being found in Austin's food store, there was no evidence introduced that any of Jerry Porter's fingerprints were found or even sought out for purposes of comparison. The trial court sustained defense counsel's objection and, although it gave no curative instructions, we do not find that the prosecutor's argument was so unreasonable as to amount to plain error. *Dixon v. State,* 476 So.2d 1236 (Ala.Cr.App.1985) (prosecutor's argument attempting to inject criminal record of defense witness into evidence was cured by trial court's sustaining of objections and giving instructions to the jury that there was no evidence of prior criminal conduct of the witness). See also *Holladay v. State,* supra, at 131, quoting *Bui v. State,* supra (wherein it was held that improper prejudicial statements are generally considered eradicated when the trial court sustains the defendant's objection or gives curative instructions or both).

> "[PROSECUTOR]: Now, I submit to you that we have proven beyond a reasonable doubt, the evidence on each of the counts of the indictment that you will have before you. When I talk about reasonable, defense attorneys sometimes would have you believe that that is with certainty. That is not what the law says, and I would ask you to listen when the Court explains the applicable law to you. Reasonable doubt is simply a doubt for which you can give a good reason: not conjecture, speculation. Sure, you could speculate about all kinds of things, but

you should make your decision based only on the evidence that you have heard. The burden of proof in this case is the same in any case when the State has prosecuted. And that burden is overcome every day. Obviously people commit crimes, and people get convicted of them. It is like the Scales of Justice. I know all of you have seen that. We have to balance those scales. It is not overcoming the burden of proof for the State; it is not some impossibility."

"And the people's rights, now, need to be enforced; people have a right to live free from crime and criminals. It is time for you to fulfill your obligation.

"[DEFENSE COUNSEL]: Judge, we are going to object to this line of argument as being illegal [based] on the cases cited by the Eleventh Circuit.

"THE COURT: I will sustain.

"[PROSECUTOR]: All right, sir. I would like to ask you to think about this for a minute. We have talked about all of the witnesses except one. Unfortunately she is not a witness in body. But imagine, if you will, how Patricia Vallery Reynolds felt. You know, we are here in a rather sterile, sometimes it may seem cold atmosphere of the courtroom. But it is abstract: we can sit back and look and see what happens,

> and think about it, talk about it, and so forth. But the crime happens within the hot lights of violence. And I wonder how she felt that night? The fear—
>
> "[DEFENSE COUNSEL]: Your Honor, I am going to object. This is pleading sympathy from the jury; it is not proper, and we do object.
>
> "THE COURT: Sustained."

The prosecutor's comments concerning the jury's obligation and "justice" were proper comments as an appeal by the prosecutor for law enforcement. See e.g. *Ex parte Waldrop*, 459 So.2d 959, 961-62 (Ala.1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); *Allen v. State*, 462 So.2d 1031, 1035 (Ala. Cr.App.1984). The appellant argues that this summation by the prosecutor was a "patently improper emotional appeal" ; however, this court has upheld similar comments during a prosecutor's closing. See e.g. *Rutledge v. State*, 523 So.2d 1087 (Ala.Cr.App.1987), reversed on other grounds, 523 So.2d 1118 (Ala.1988); *Lewis v. State*, 456 So.2d 413 (Ala.Cr.App.1984).

> "[PROSECUTOR]: You know one thing I do note that neither of the defense attorneys have talked about in the evidence or really dwelt on: they did not talk about that gun in that car right beside the man underneath the arm rest, loaded, up in Ohio. And they did not talk about the bullets in his pocket; and they did not talk

> about the bullets down in the floorboard of the car—the ones he said he was biting on. He said he knew those were there, but he didn't know about the gun being there. Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, and you have not heard an explanation; the evidence doesn't show you any other explanation for it."

The appellant objects to the above-quoted comment, alleging it constituted a comment on his failure to testify. No objection was made to this comment at trial.

> "'While this failure to object does not preclude review in a capital case, *it does weigh against any claim of prejudice.' Ex parte Kennedy,* 472 So.2d [1106] at 1111 [(Ala.1985)](emphasis in [Kennedy]). 'This court has concluded that the failure to object to improper prosecutorial arguments . . . should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' *Johnson v. Wainwright,* 778 F.2d 623, 629 n.6 (11th Cir. 1985), *cert. denied,* 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987). 'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the

> fairness, integrity, and public reputation of the judicial proceedings.' *United States v. Butler,* 792 F.2d 1528, 1535 (11th Cir.), *cert. denied,* 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986). See also *Biddie v. State,* 516 So.2d 837, 843 (Ala. Cr.App.1986), *reversed on other grounds,* 516 So.2d 846 (Ala.1987)."

Kuenzel v. State, 577 So.2d 474, 489 (Ala.Cr.App.1990).

> "'In evaluating a claim that the prosecutor's statement amounted to a comment on the defendant's failure to testify, "the facts and circumstances of each case must be carefully analyzed to determine whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."' *Brinks v. State,* 500 So.2d 1311, 1314 (Ala.Crim.App.1986) (quoting *McKissick v. United States,* 379 F.2d 754, 757 (5th Cir. 1976)). See also *Marsden v. Moore,* 847 F.2d 1536 (11th Cir.), cert. denied, 488 U.S. 983, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988); *Daly v. State,* 442 So.2d 143 (Ala.Crim. App.1983)."

Owen v. State, 586 So.2d 958 (Ala.Cr.App.1990).

While we are mindful of the similarity between this comment and the prosecutorial comment made in *Windsor v. State,* 593 So.2d 87 (Ala.Cr.App.1981), in that case, the

prosecutor commented, while pointing at the appellant, that "he cannot explain why he had the deceased's pistol in his possession at the time of his arrest." Defense counsel vigorously objected to the comment and noted that the prosecutor had pointed at the defendant or the table at which the defendant was seated when he made this statement. This gesture emphasized the defendant's role as the only and obvious party to properly refute the evidence.

> "In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract. *Whitlow v. State,* 509 So.2d 252, 256 (Ala.Cr.App.1987); *Wysinger v. State,* 448 So.2d 435, 438 (Ala.Cr.App.1983); *Carpenter v. State,* 404 So.2d 89, 97 (Ala.Cr.App.1980), *cert. denied,* 404 So.2d 100 (Ala.1981). Moreover, this Court has also held that statements of counsel and argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict. *Orr v. State,* 462 So.2d 1013, 1016 (Ala.Cr.App.1984); *Sanders v. State,* 426 So.2d 497, 509 (Ala.Cr.App.1982)."

Bankhead, supra. See also *Duren,* supra.

As this court noted in *Windsor,* supra, the Alabama Supreme Court has indicated that a prosecutor's comment on a defendant's failure to testify is subject to the harmless error rule. *Id.,* citing *Ex parte Wilson,* 571 So.2d 1251, 1265 (Ala. 1990). In light of the prosecutor's entire argument, we do not believe that the comment made in the case was intended to be a reference to the appellant's silence or that the jury "would naturally and necessarily" consider it to be a comment on the appellant's failure to testify. *Owens v. State,* supra. Moreover, we do not believe that this comment constituted plain error such that "when examined in the context of the entire case, [this error] is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings." *United States v. Butler,* 792 F.2d 1528, 1535 (11th Cir.), cert. denied, 479 U.S. 933,107 S.Ct. 407, 95 L.Ed.2d 359 (1986).

XVII

The appellant argues that all of the physical evidence which was seized from him by the Ohio police, as well as the statement taken when he was in custody, should have been suppressed because, he argues, this evidence was the fruit of an illegal arrest. The record indicates that an Ohio State Trooper testified at trial that, in the early morning of January 3, 1985, he drove into a rest area, where he observed a parked vehicle, which he noticed because the trunk lock had been punched out. The trooper checked the vehicle's tag number and determined that the vehicle had been reported as stolen, according to a NCIC report. The trooper intended to wait for other officers

to arrive; however, the vehicle's back-up lights came on and the car began to back out of the parking slot. The trooper testified that he then immediately approached the vehicle with his weapon pointed at the appellant, and instructed the appellant to put his hands up. The trooper told the appellant why he was being stopped, and the appellant hesitantly followed the trooper's instructions. The trooper testified that the appellant stated that the vehicle he was in belonged to his uncle and that his uncle had been accompanying him in another vehicle, which had been parked next to him. He told the trooper that his name was Rufus Williams and that he was born on July 7, 1958. When asked how old he was the appellant stated that he was 23 years old; the trooper stated that the dates did not add up properly. The trooper asked for further identification. The appellant stated that he had none and the trooper asked if he carried a wallet. The appellant presented his wallet, and the trooper found a social security card belonging to Anthony G. Crawford, whom the appellant and his wife had visited in Tuscaloosa. The appellant then stated, "I lied to you; that's me. I am not Rufus Williams." The trooper testified that thereafter he performed an administrative inventory search of the vehicle, pursuant to the standard procedure of the Ohio Highway Patrol and, that upon entering the vehicle, he immediately observed a .38 caliber Smith & Wesson handgun underneath the arm-rest. He further found a box of .38 special cartridges and he also found bullets on the appellant's person. The appellant stated that the gun belonged to his uncle.

Appendix E

The basis for the appellant's objection to the arrest is the trooper's report wherein it states that, he "got an NCIC hit on the car, also says he then arrested the defendant. And he then verified that the car was stolen."

The appellant's arrest was proper as the trooper had sufficient probable cause to a conduct a warrantless arrest. Although the State seems to argue that the appellant was merely being detained and questioned under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), it is clear that, when the trooper approached with a drawn gun, which he pointed at the appellant, telling him to raise his hands, the appellant was under arrest. See e.g. *Jordan v. State*, 549 So.2d 161 (Ala.Cr.App.1989). The trooper had sufficient probable cause based on his observation that the "trunk lock was punched," that is, that the trunk lock had been removed, that the vehicle had an Alabama license plate and was present at approximately 2:00 a.m. at a rest area in Ohio and that the file check of the vehicle showed that it was entered into NCIC as stolen. See e.g. *Bryant v. City of Gadsden*, 574 So.2d 919, 920-21 (Ala.Cr.App.1990) (an officer may rely upon a police radio broadcast to stop and arrest a suspect where the officer also had "'a particularized and objective basis for suspecting the [defendant] of criminal activity.'" *Id.*, quoting *Ex parte Betterton*, 527 So.2d 747, 749 (Ala. 1988)). Therefore, because the appellant's arrest was proper, the evidence seized from the vehicle was taken incident to a lawful arrest, *Manning v. State*, 568 So.2d 327 (Ala. Cr.App.1990), and subsequent inventory search, and his confession was not to be excluded, because it was not the fruit of an illegal arrest. *Williams v. State*, 565 So.2d 1233 (Ala.Cr.App.1990).

Appendix E

XVIII

The appellant argues that John Stephens's identification of him should have been suppressed because it was induced by a suggestive lineup. The appellant bases his argument on the fact that John Stephens, a State's witness, picked the appellant out of a photographic array, wherein the appellant states that he was the only suspect who was displayed against a red background and the only suspect who held a plaque under his chin that said "Jefferson County Jail." The record indicates that the appellant's picture was framed during the array, so that only part of the wording, if any, was visible when Stephens viewed it. The record indicates further that the background of the photograph was red, because the photograph was taken at the Jefferson County jail. Furthermore, the record indicates that all of the pictures were distinct in some way, in that some of them had numbers on them, and some of them had height marks behind the individual. The State presented evidence that no suggestions were made by the police to Stephens as to making his identification.

> "It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S. [377], at 384, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 [at 971] (1968). While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning

> the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."

Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401 (1972).

Even if the photographic array could have been said to be unduly suggestive, the in-court identification by Stephens was clearly independently reliable. "'[W]hether eyewitness identification evidence which ensues from a pre-trial identification procedure is constitutionally infirm requires a two-step inquiry. First, it must be determined whether the pre-trial identification procedures were unduly suggestive. . . . If so, then the suggestiveness of the identification procedures must be balanced against factors indicating that the in-court identification was independently reliable.' *Dickerson v. Fogg*, 692 F.2d 238, 244 (2d Cir. 1982)." *Hull v. State*, 581 So.2d 1202 (Ala. Cr.App.1990). "In *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) the United States Supreme Court set out certain factors to be considered in evaluating the reliability of an identification. These factors, as reaffirmed in *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977), include 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention,

the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.'" *Hull v. State*, supra. Each case is to be decided pursuant to a totality of the circumstances review. *Manson v. Brathwaite*, 432 U.S. at 110, 97 S.Ct. at 2251.

In the present case, the record indicates that the witness, John Stephens, lived in the same apartment complex as Cynthia Love and that he spoke to the appellant on two occasions while he was staying at the apartment. He first saw the appellant as he was carrying belongings into the apartment of Cynthia Love. The witness testified that he asked the appellant if he knew Cynthia Love, and that the appellant responded that he did and commended the witness for looking out for her. The witness again spoke to the appellant for a more extended period of time, after the police began investigating the crime. The witness testified that he observed the appellant with another man in a vehicle. He called the appellant over to his apartment and the appellant responded. He informed the appellant that the police had been looking for both the appellant and his wife in connection with the investigation of the offense. The appellant responded that he was concerned for his wife's welfare, with such a criminal on the loose. The witness then attempted to get some beer from the appellant; however, the appellant indicated that he had none. The witness also testified that he observed the appellant, prior to the latter conversation, fumbling with keys and apparently attempting to enter or lock Cynthia Love's apartment. The witness testified that this occurred possibly on the night of the offense. The witness was very specific and accurate in his descriptions of the appellant. It

is further evident that the witness identified the appellant with a high level of certainty.

Based on the above, we find that the witness's identification of the appellant was reliable.

XIX

The appellant argues that the identification of him made by witnesses Howard Marsh, Ronnie Thomas, and Steven McDaniel should have been suppressed because he was denied his right to have retained counsel present when these witnesses identified him in a lineup. The record indicates that these three witnesses all saw the perpetrator of the offense in Austin's food store on the night in question. Thereafter, on February 21, 1985,[3] a pre-indictment lineup, which included the appellant, took place wherein all three witnesses positively identified him as the man that they had seen in Austin's on the night of the murder. The record indicates that the appellant's court-appointed attorney was present at the lineup. However, at the suppression hearing, the appellant argued that he had retained another attorney to work on his case in addition to his appointed attorney and that he had requested the presence of this attorney at the lineup, but that his request was refused.

However, "[a] defendant does not have a constitutional right to have counsel present at a pre-indictment lineup. *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d

3. The appellant was not indicted until May 3, 1985.

411 (1972); *Franklin v. State*, 424 So.2d 1353 (Ala.Crim. App.1982), *cert. denied*, 424 So.2d 1353 (Ala.1983); *Tankersley v. State*, 448 So.2d 486 (Ala.Crim.App.1984); *Fisher v. State*, 439 So.2d 176 (Ala.Crim.App.), *cert. denied*, 439 So.2d 176 (Ala.1983)." *Johnson v. State*, 526 So.2d 34, 38 (Ala.Cr.App.1987). See also *Hollingquest v. State*, 552 So.2d 1078 (Ala.Cr.App.1989). Moreover, the appellant in fact had counsel present. All three witnesses, furthermore, stated that they were absolutely certain that the appellant was the man that they had seen. The appellant argues that, because two of the witnesses had previously tentatively identified Jerry Porter as the man whom they had seen, their identifications were unreliable. However, the record is clear that these two witnesses' identifications of Porter were in fact tentative, and that they stated that Porter simply looked like the man whom they had seen. Therefore, the trial court properly overruled the appellant's motion to suppress the identification of him made by these three witnesses.

XX

In accordance with § 13A-5-53, *Code of Alabama* 1975, we have reviewed the record, including the guilt and sentencing proceedings, for any error which adversely affected the rights of the appellant, and we have found none. Nor do we find any evidence that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Appendix E

The trial court properly found the existence of three aggravating circumstances: that the appellant had previously been convicted of another felony involving the use or threat of violence to the person, § 13A-5-49(2); that the crime was committed during a robbery and a rape in the first degree, § 13A-5-49(4); and that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses, § 13A-5-49(8). The trial court found the existence of no statutory or nonstatutory mitigating circumstances.

After an independent weighing of the aggravating and mitigating circumstances in this case, we find that the evidence supports the trial court's conclusion and indicates that death was the proper sentence. The sentence of death in this case is neither excessive nor disproportionate to the penalties imposed in similar cases, considering both the crime and the defendant. For murder during robbery, see *Kuenzel v. State,* supra; *Henderson v. State,* 583 So.2d 276 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala.1991); *Stephens v. State,* 580 So.2d 11 (Ala. Cr.App.1990), affirmed, 580 So.2d 26 (Ala.1991); *Tarver v. State,* 553 So.2d 631 (Ala.Cr.App.1989), affirmed, 553 So.2d 633 (Ala.1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1837, 108 L.Ed.2d 966 (1990). For murder during rape in the first degree, see *Freeman v. State,* 555 So.2d 196 (Ala.Cr.App.1988), affirmed, 555 So.2d 215 (Ala.1989), cert. denied, 496 U.S. 912, 110 S.Ct. 2604, 110 L.Ed.2d 284 (1990); *Bradley v. State,* 494 So.2d 750 (Ala.Cr.App.1985), affirmed, 494 So.2d 772 (Ala. 1986), cert. denied, 480 U.S. 923 (1987), 107 S.Ct. 1385, 94 L.Ed.2d 699; *Thompson v. State,* 542 So.2d 1286 (Ala.Cr.App.1985), affirmed, 542

So.2d 1300 (Ala.), cert. denied, 493 U.S. 874 110 S.Ct. 208, 107 L.Ed.2d 161 (1989).

Because the appellant's conviction and sentence of death are proper, the judgment of the circuit court is affirmed.

AFFIRMED

PATTERSON, P.J., and TYSON, McMILLAN, JJ., concur.

BOWEN J., dissents with opinion, TAYLOR, J., joins in dissent.

Appendix E

DISSENT

BOWEN, Judge, dissenting

I dissent from Part XVI of the opinion of the majority. The appellant here, like the accused in *Windsor v. State*, 593 So.2d 87 (Ala.Cr.App.1991), was apprehended after the commission of the capital offense with the murder weapon in his possession. The prosecutor here, like his counterpart in *Windsor,* reminded the jury that no explanation had been given for the accused's possession of the weapon. The argument in *Windsor* was as follows:

> "[Defense counsel] just glossed over this . . . . [T]hey can't explain this—they can't explain why this weapon was in the defendant's pocket when he was arrested. Can you offer me another reasonable hypothesis as to how that weapon got there?"

The argument here was:

> "[N]either of the defense attorneys have talked about . . . . that gun in that car right beside the man underneath the arm rest . . . and they did not talk about the bullet in his pocket. . . . Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, *and you have not heard an explanation;* the evidence doesn't

show you any other explanation for it."

A "'statement by a prosecuting attorney to the effect that the evidence for the state is uncontradicted or undenied is not a comment on the defendant's failure to testify unless the defendant himself is the only one who can contradict or deny the evidence. *Williams [v. State],* 461 So.2d [834] at 843, [(Ala. Cr.App.1983), reversed as to result, *Ex parte Williams,* 461 So.2d 852 (Ala.1984)]." *Stain v. State,* 494 So.2d 816, 817 (Ala.Cr.App.1986).

Like the accused in *Windsor,* the appellant here was the only one who could have explained his possession of the murder weapon. Therefore, the argument here, like the argument in *Windsor,* constituted an indirect comment on the defendant's failure to testify because the prosecuting attorney "by an indirect reference . . . virtually identif[ied] the defendant as the person who did not take the stand." *Ex parte Williams,* 461 So.2d at 854.

This court reversed the conviction in *Windsor,* yet the majority affirms here. It justifies the different results in these two cases, decided just four months apart, by noting that in *Windsor,* (1) the prosecutor "pointed" to the accused when he made the comment, and (2) the defense objected to the comment. Here there was no pointing and no objection. Neither the lack of "pointing" nor the lack of an objection is sufficient to distinguish this case from others, including *Windsor,* which have been reversed for indirect prosecutorial comments on the accused's failure to testify.

Appendix E

The majority makes too much of the "pointing" in *Windsor.* That physical gesture was superfluous because the defendant there, just like the appellant here, was the only one who could have been expected to explain his possession of the murder weapon. Under the facts of *Windsor* (which, for present purposes, are identical here), the prosecutor's *words* "close[ly] identifi[ed]. . . the defendant as the person who did not become a witness." *Ex parte Wilson,* 571 So.2d 1251, 1261 (Ala. 1990). The accompanying gesture added little or nothing to the prosecutor's verbal invitation to hold the accused responsible for failing to refute the State's evidence.

It is true that in both *Ex parte Wilson* and *Windsor v. State,* cited in the majority opinion, there were defense objections to the alleged comments on failure to testify. However, both *Wilson* and *Windsor* relied on *Ex parte Williams,* supra, a "plain error" case in which there was no objection to the prohibited comment. See *Williams v. State,* 461 So.2d at 843.

Because we found a virtually identical prosecutorial comment to be error in *Windsor,* there is no question that *this* comment was error. "'Error' is 'plain error'. . . when it 'has or probably has adversely affected the substantial rights of the [defendant],' Rule 39(k) [and Rule 45A], A.R.App.P., and plain error is to be acted upon 'in the same manner as if the defendant's counsel had preserved and raised [the] error for appellate review.' *Johnson v. State,* 507 So.2d 1351, 1356 (Ala. 1986)." *Ex parte White,* 587 So.2d 1236 (Ala. 1991). The error here was "plain" because it affected the rights of this appellant in the same

way as the error affected the accused, under very similar circumstances, in *Windsor*.

I dissent because I believe that if *Windsor* were correctly decided and should have been reversed, then this conviction should also be reversed.

APPENDIX F — JUDICIAL SENTENCING ORDER, DATED OCTOBER 16, 1986

Case No. CC-85-437

STATE OF ALABAMA

vs.

JAMES EDMOND MCWILLIAMS, JR.

SPECIFIC FINDINGS

This cause having been heard in open court on October 9, 1986 for determination of the sentence to be imposed herein, after the sentence hearing or punishment phase had been conducted, and after the jury had returned an advisory verdict, and the Court having ordered and received a written pre-sentence investigation report, and the parties having been given a copy of said report and been given the opportunity to respond to it and to present evidence to the Court about any part of it, and said report having been made a part of the record in this case, and the parties having been permitted to present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed and any other evidence; and the Court having considered the evidence presented at trial and re-submitted during the sentence determination hearing, the evidence presented during the sentence hearing and re-submitted, the recommendation of the jury contained in its advisory verdict, the pre-sentence investigation report and evidence submitted in connection with it, other

evidence submitted by the parties, and the arguments of the parties; the Court hereby makes and enters the following findings:

THE CRIME AND DEFENDANT'S PARTICIPATION

The defendant, James Edmond McWilliams. Jr., raped, robbed, and murdered Patricia Vallery Reynolds. The crime occurred on December 30, 1984 at Austin's Food Store, Hargrove Road, Tuscaloosa, Alabama.

Patricia Vallery Reynolds was a clerk at Austin's, a convenience store. The defendant went into the store, locked the front doors, robbed Mrs. Reynolds by taking money from her possession, took her to the back room and brutally raped her, then shot her with a .38 caliber pistol. There were 16 gunshot wounds (8 entrance, 8 exit). She was initially shot while standing, and also shot while lying on the floor. She was shot 6 times, with 2 of the bullets first penetrating her hand or arm before entering and exiting her body. The bullets penetrated both lungs, both hemidiaphragms, the liver, pancreas, stomach, spleen, upper forearms, and hand.

Mrs. Reynolds died in surgery at 12:40 a.m. The cause of death was exsanguination.

The defendant was identified by eyewitnesses who placed him at the scene.

Appendix F

The defendant was apprehended in Findlay, Ohio, driving a stolen car. The murder weapon (also stolen) was in his possession. He was jailed in Ohio charged with Auto Theft, Possession of Stolen Property, Carrying a Concealed Weapon, and No Operator License. While in the Ohio jail, he bragged to other inmates that he robbed, raped, and killed a woman in Alabama.

The jury deliberated less than one hour before returning a verdict of guilty. The following day, the jury recommended the death penalty.

AGGRAVATING CIRCUMSTANCES

Pursuant to Code of Alabama, 1975, Section 13A-5-47(d), the Court proceeds to determine the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, Code of Alabama, 1975, as follows:

(1) "The capital offense was committed by a person under sentence of imprisonment."

This court finds this aggravating circumstance to be nonexistent and not an issue in the case.

(2) "The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person."

This Court finds from the evidence that this aggravating circumstance does exist. State's exhibit #102

introduced during the 2nd phase of the trial consists of certified copies of prior convictions of the defendant for the offenses of Robbery in the 1st Degree and Rape in the 1st Degree, said convictions being CC 85 545 and CC 85 546 respectively in the Circuit Court of Mobile County, Alabama, dated June 26, 1985.

(3) "The defendant knowingly created a great risk of death to many persons."

This Court finds this aggravating circumstance to be nonexistent and not an issue in this case.

(4) "The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping."

This Court finds from the evidence that this aggravating circumstance does exist.

The defendant murdered Patricia Vallery Reynolds, while he was engaged in the commission of rape and robbery.

(5) "The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."

This Court finds this aggravating circumstance to be nonexistent and not an issue in this case.

(6) "The capital offense was committed for pecuniary gain."

This Court finds this aggravating circumstance to be nonexistent and not an Issue in this case.

(7) "The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws."

This Court finds this aggravating circumstance to be nonexistent and not an issue in this case.

(8) "The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses."

This Court does find from the evidence presented at trial that the capital offense was especially heinous, atrocious, or cruel compared to other capital cases.

This finding is based upon the evidence of the execution type slaying of the victim, coupled with the number of times the victim was shot, after having been brutally raped and robbed, and done to eliminate an eyewitness to the rape and robbery.

This finding is also based upon the behavior of the defendant during and immediately after this crime, his obvious lack of regard or compassion for the life and human dignity of the victim.

Appendix F

MITIGATING CIRCUMSTANCES

(STATUTORY OR OTHERWISE)

Pursuant to Section 13A-5-47(d) of the Code of Alabama, 1975 the court proceeds to determine the existence or nonexistence of mitigating circumstances enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52.

As to statutory mitigating circumstances:

(1) "The defendant has no significant history of prior criminal activity."

To the contrary, this Court finds from the evidence that the defendant does have a significant history of prior criminal activity as stated hereinabove and as shown in the record of arrest(s) contained in the written pre-sentence investigation report made a part of the record herein.

(2) "The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."

This Court finds that the preponderance of the evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance.

Evidence was presented as to this circumstance during Phase II of this trial, being the punishment phase,

however, after consideration of this evidence, this court finds that the preponderance of evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance.

(3) "The victim was a participant in the defendant's conduct or consented to it."

This Court finds that there was no evidence presented that the victim participated in or consented to defendant's conduct, and that this mitigating circumstance does not exist.

(4) "The defendant was an accomplice in the capital offense committed by the another person and his participation was relatively minor."

This Court finds that there was no evidence presented that the defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor, and that this mitigating circumstance does not exist.

(5) "The defendant acted under extreme duress or under the substantial domination of another person."

This Court finds that there was no evidence presented that the defendant acted under extreme duress or under the substantial domination of another person, and that this mitigating circumstance does not exist.

(6) "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

The Court finds that the preponderance of the evidence established that the defendant did have the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law that this capacity was not substantially impaired, and that this mitigating circumstance does not exist.

(7) "The age of the defendant at the time of the crime."

The evidence presented as to the age of the defendant at the time of the crime varies from age 24 to age 27 with birthdates ranging from 11-10-57 to 11-10-60. This Court finds the age of defendant, in any event, not to be a mitigating circumstance.

In addition to the above enumerated mitigating circumstances, the defendant was given the opportunity during the 2nd phase of the trial before the jury returned its' advisory verdict to present any other evidence of mitigating circumstances, and to make any statement of mitigating circumstances. The defendant testified that he had received two blows to the head at various times and places, and that this resulted in some organic brain damage.

Following the verdict of the jury recommending the death penalty, the defendant requested that this Court order neurological and neuro-psychological testing, and this request was granted.

Appendix F

This Court interprets Section 13A-5-47 of the Code of Alabama 1975 as limiting in what additional evidence may be presented in the third phase, the exception being evidence in response to any part of the pre-sentence investigation report which is the subject of factual dispute.

Nevertheless, the Court reviewed additional evidence presented by the defense as to the results of the neurological and neuropsychological testing of the defendant and other medical records of the defendant made a part of the record from Holman Prison and from Taylor-Hardin Secure Medical Facility, and after a careful review and consideration of these records and reports the Court finds that the defendant was not and is not psychotic, either from organic brain dysfunction or any other reason. The Court does find that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that this does not rise to the level of a mitigating circumstance. The Court finds that the preponderance of the evidence from these tests and reports show the defendant to be feigning, faking, and manipulative.

The Court further finds that even if this did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance.

CONCLUSION

All of the proper evidence having been received, the arguments given and statements made, the Court proceeds

to weigh the aggravating and mitigating circumstances and balancing these circumstances against each other.

The Court has determined the existence or nonexistence of each aggravating circumstance as it applies to James Edmond McWilliams, Jr. individually, and the Court has determined the existence or non-existence of each statutory enumerated mitigating circumstance and any other mitigating circumstance as it applies to James Edmond McWilliams, Jr., individually. The consideration given by the Court has been specifically directed to James Edmond McWilliams, Jr. as an individual and to the instant charge against him.

The Court finds the existence of three statutory aggravating circumstances as set out herein and further finds that no mitigating circumstances exist, either statutory or otherwise.

It is, therefore, the conclusion of this Court that the aggravating circumstances overwhelmingly outweigh the mitigating circumstances.

Accordingly, the Court accepts the recommendation of the jury in its advisory verdict that the penalty of death be imposed upon Edmond McWilliams, Jr.

Done this the 16th day of October, 1986.

/s/

J.B. Baird, Judge Presiding

APPENDIX G — SENTENCING HEARING TRANSCRIPT, DATED OCTOBER 9, 1986

[1404]SENTENCING HEARING

October 9, 1986; 10:30 a.m.

THE COURT: Are you ready to proceed, gentlemen?

MR. STEVERSON: The State is ready, Your Honor.

MR. FREEMAN: Yes, sir.

MR. SOGOL: No, sir, the Defense is not ready to proceed, Your Honor. I would like to state for the record the reason why.

THE COURT: All right. Go ahead, Mr. Sogol.

MR. SOGOL: Your Honor, prior to the trial of this case, Your Honor was advised, along with Mr. Freeman, that Mr. McWilliams had come up here from Holman Prison on an assortment of drugs that were prescribed for him by the prison authorities.

We had a discussion, as I recall, in chambers concerning the problems that might or might not cause during [1405]the course of the trial, and I agreed that it would not be a problem under that circumstance. But I would remind Your Honor that both you and Mr. Freeman were aware that he was taking certain drugs prescribed for him by the people at Holman.

As a result of that combination of drugs, which it was testified by Mr. McWilliams at the Sentencing Hearing, that it involved Melloril, Desiril, and Librium, we subpoenaed from the Department of Corrections, Mr. McWilliams' records. That was in August of this year. In September of this year, the records had not been provided to The Court by the subpoena. I filed a motion to show cause why the Department of Corrections should not be held in contempt. That was set down to be heard contemporaneously with the sentencing hearing that was scheduled for the 1st of October. Due to a death in my family, I had to be in Wisconsin at that time, and that hearing was put over to today. Upon my return from Wisconsin, I inquired as to whether or not that material had been provided by the Department of Corrections, and I was told it had not. I believe Mr. Freeman, I and Your Honor met that following Thursday, and we pointed out that that material had not been provided to me by the Department of Corrections.

Since that time, both Mr. Freeman and myself have made every effort possible, I believe, to get the [1406]authorities with the Department of Corrections to provide those records. I have, and I would offer for the record, copies from the PDR of the drugs which Mr. McWilliams has testified and which the record will reflect that he is taking. That is: Librium capsules, Desiril, and Melloril.

Specifically under Melloril for indications from PDR, it says: (reading) "For the manifestations of psychotic disorders." That was the reason that we subpoenaed

the material from Holman from the Department of Corrections, the Board of Corrections. As of 5 o'clock yesterday, that material was not here. I have been advised by The Court that that material arrived this morning sometime. I have not had an opportunity to review that material other than briefly in Your Honor's office, where I pointed out to Your Honor that there were indications in there or references in there that there was no evidence of psychosis today; that I did not have time to go through all the records nor to have the records reviewed by anyone else. Since I am not a psychologist or a psychiatrist, as to whether or not there was a need to have the people from Holman present to testify as what caused them to prescribe antipsychotic medication for Mr. McWilliams. I have not had an opportunity to talk with those people nor review those records. They did not come in until this morning sometime. This hearing was scheduled at 10 o'clock this morning.

[1407]The second part of my inability to prepare today, deals with my request for certain tests to be run on Mr. McWilliams. After having someone privately review the Bryce records for me, I was advised that, based on the history and certain behavior patterns identified in the Bryce records themselves, that there was a possibility of some organic brain problem with Mr. McWilliams. I petitioned The Court for certain tests to be run. One test was run by someone at Holman, Dr. Bivens, who advised The Court in a letter which is in the file, that his test was inconclusive, but it left possible organic impairment, possible psychological impairment, or possible malingering. And he recommended private

evaluation of the remaining tests requested, since the Department was not able to run those tests and did not have adequate facilities. And he listed the names of 2 people in Mobile who he thought would be able to run the tests.

While I was gone, Mr. McWilliams was evidently transferred up here, and without my knowledge transferred back to Taylor Hardin where it is already testified he has a lawsuit pending against the facility and the staff, and further tests were run on him. The results of those tests were delivered to my office Tuesday afternoon. A Doctor Goff at Bryce, from my understanding--not at Taylor Hardin--had run the tests, and had reported some organic brain dysfunc-[1408]tion, as a result of the tests. I then Tuesday afternoon, asked Your Honor to send an order to Bryce, asking them for the records, on the basis of that conclusion.

I have here the records that were delivered by Bryce, subject to that order. The records contain no information concerning the tests run; they do not contain the tests; there is no way that I can evaluate or have someone else go behind and recheck the results found, which I think would be necessary in this case. Not that I impugn Doctor Goff in any way, but I feel that, given the nature of this case, that it is necessary on my part to have someone else review these findings. There is nothing in those records: no test results, no nothing, that would allow me to have anybody go along and review and determine the validity of his findings.

Because of those 2 things, we are unable to present any evidence today, although I think that there is indication that, at least at some point in time, based on the medications prescribed and the brief notes in the records, that someone has determined some psychotic behavior on the part of Mr. McWilliams. But we are unable to present anything because of the shortness of time between which this material was supplied to us and the date of this hearing. And I would like to emphasize for the record that, in [1409]my opinion, both The Court and the District Attorney have done all they can to try to force, and I mean force, the Board of Corrections and the Department of Mental Health to provide this material for us, but that it seems to me at that time point in time that, because of their refusal, their disinterest, whatever the reasons for failure to send the records, that Mr. McWilliams is being punished instead of the people who have not provided the material. We simply do not have anything to present at this time.

THE COURT: Any response, Mr. Freeman?

MR. FREEMAN: If The Court please, in hearing Mr. Sogol tell about the records, and so forth, as I recall, I don't recall hearing anything that would indicate any evidence of psychosis of this man today, in any records. Now, I don't know how long this checking test scores, and so forth, how far that can go. I certainly as the District Attorney, do not want anything to happen concerning this case which might cause a reversal on appeal, and certainly that is something that I as District Attorney, must always try to guard against. But I am not following the argument of the Defense as to anything in these records: in other

words, Doctor Goff has checked the man out, he has given him an examination, and he has reached his conclusions. This was at the request of the Defense originally, as I re-[1410]call.

MR. SOGOL: Not that it be done at Taylor Hardin.

MR. FREEMAN: No, sir. I wasn't done at Taylor Hardin, as I recall. He was housed at Taylor Hardin.

MR. SOGOL: I was done at Taylor Hardin.

MR. FREEMAN: And Doctor Goff is not associated with Taylor Hardin, as far as I know.

MR. SOGOL: Judge, my point to you is: he was brought up here taking psychotropic medication; when I was advised of that, I sent subpoenas to the people who had dispensed the medication to him, for the reasons--there are at least 2 provisions under State Law that deal with mitigating circumstances, that deal with mental or emotional condition--that if the man has been found to have psychotic tendencies or to need antipsychotic medication, that that may in fact be mitigation or weigh as a mitigating circumstance. At the time I found out about it until today, I have done everything in my power, and I think Charlie has done everything in his power to get that material here for evaluation. And it arrived this morning, and it is not enough time [1411]for me to determine whether or not I need to have the doctor from Holman come up here and testify that he tested this man and he was found to be psychotic or not. All I have is the medication that he

is taking, and I think that it is just incumbent upon me to have a second opinion as to the severity of the organic problems discovered. I mean, it seems to me that Mr. McWilliams twice prior to my intervention with the requested examination, had already been examined at length on 2 occasions, by the people at Taylor Hardin; he had been examined by the people in the correctional facilities, and no one in any of those places has determined that there might be any organic problem; that people who were volunteering their services to me were reviewing the Bryce records, the Taylor Hardin records, the social history of Mr. McWilliams. And they determined that there might be a problem, based on the symptomatology in the records and the social history. It seems to me that if we are going to put our faith in Taylor Hardin and people out there, that they ought to be as trained individuals and supposed experts in their areas, able to find things like that without having to be told that they exist. And I have very little confidence in their findings.

Mr. FREEMAN: An additional comment, if The Court please: Mr. Bivens that Mr. Sogol was referring to is, of course, not the attorney at the counsel table, but rather [1412]a Psychologist II, which is a level of psychologists with the prison system--I believe it is the Department of Corrections, and it is a matter of record in the Court File. As I understand it, that is far from the highest level of expertise in psychology--that he merely suggested that these tests perhaps should be conducted. And that following that, these tests were conducted, as I understand it, and the conclusions have been reached and given to The Court in the form of the letter to Doctor--I

am not sure how than name is pronounced--Goff or Jeff, or whatever it is.

THE COURT: All right. Well, let's proceed.

MR. FREEMAN: If I can, I will agree, if The Court please, that the matters that Mr. Sogol has stated about the problems that we have had with the Department of Corrections, that is certainly true, as Your Honor is probably well aware, also. We have had considerable difficulty in getting these records from them, and also, I believe, the Department of Mental Health, at this point.

MR. SOGOL: Yes, sir.

THE COURT: Anything else, Mr. Sogol?

MR. SOGOL: No, sir, other than offering from the [1413]PDR, showing the 3 drugs that Mr. McWilliams has had prescribed by The Department, showing that they are for antipsychotic indications. One of them, at least, is specifically for antipsychotic treatment. And the other 2 are collateral to the Mellaril, and used in addition to it. We have not got the ability to present anything else at this time.

THE COURT: All right. Let's proceed, Mr. Freeman.

EVIDENCE FOR THE STATE OF ALABAMA

MR. STEVERSON: We call as our first witness, Your Honor, Belinda Medders.

Appendix G

BELINDA MEDDERS,

was sworn, examined, and testified as follows:

DIRECT EXAMINATION

BY MR. STEVERSON:

Q State your name for the record, please.

A Belinda Medders.

Q And what is your occupation?

[1414]A State Probation and Parole Officer.

Q And how long have you been involved in that kind of work?

A Slightly less than 5 years.

Q And are you employed here in Tuscaloosa County with the Probation Office?

A Yes, I am.

Q Now, Ms. Medders, you have been assigned the case of James Edmond McWilliams, Jr. Is that correct?

A That's correct.

Q And what did you receive this assignment?

A Subsequent to his--The request for the pre-sentence was subsequent to his conviction, in August: late August.

Q And have you had the opportunity and the time necessary to do a report?

A Yes, I have.

Q And have you completed that report?

A Yes, I have.

Q And has that report been made a part of the court record?

A Yes, it has.

Q Now, Ms. Medders, I want to ask you what all did you do in your investigation of this case, and into the background of Mr. McWilliams.

A Okay. As a routine course in our office, we have a format to follow in doing any pre-sentence or probation investigation. Within that report we detail the offense: that is, give information about the circumstances of the crime. We [1415]also go into making available space for the subject's statement as to his involvement or lack of involvement in the offense; we detail the case status of co-defendants, and we also include victim information--information that is of the victim's names, and the impact that the offense has had on the survivors in the family. Also in that report we detail the legal history of

the Defendant, which is to include prior arrests, which would include juvenile and adult offenses. Then there is a personal social history segment of the investigation, where we detail information about the Defendant: that is, information as to where he has lived, where he has gone to school, spouse's names, children's names, parents' names, sibling's names, educational history, information about their health, information about prior employment, and military information. Attached to that report are also other reports of interest such as psychological reports, and we do a reputation and community activities segment, which, in that segment, we contact references, people who know the Defendant and who are willing to make statements as to what they know of the person's attitude or reputation.

Q Anything else?

A I don't know whether I mentioned it, but we do also attach to the report letters that we have received from the victim's family. We are required by State Law to notify each surviving member of the victim's family by certified mail. [1416]And they are able to put some input into our report in that they respond back to us with information regarding financial loss, psychological injury, their recommendation as to punishment in the case, and just anything that they want to say about how the crime has affected them and their lives.

Q Now, Ms. Medders, those things that you have detailed there, you have done each and every one of those things in this case; is that correct?

A Yes, I have.

Q And based upon the information that you have been able to receive through your investigation, have you been able to form an opinion as to what is the proper punishment for this Defendant in this case?

A Yes, I have.

Q And what is that opinion?

MR. SOGOL: I object to this witness answering this question. It is beyond the scope of her employment. The ultimate question is to be decided by The Court, Your Honor.

MR. STEVERSON: Your Honor, I think that that is just a part of the factors to be considered by Your Honor in determining whether or not the proper sentence- - What is the proper sentence in this particular case. I [1417]think that is also a part of the record, and that she has also made that recommendation within the record, Your Honor, that she has submitted before The Court.

MR. SOGOL: Your Honor, there is no requirement, as I understand it, that the Probation Office make a recommendation as to sentencing. There is a Remarks area, which Ms. Medders used.

THE COURT: I have Ms. Medders' written report which I have read. It is thorough. I will sustain the objection as to her ultimate opinion.

MR. STEVERSON: All right. No further questions from this witness, then, Your Honor. One moment, please, Your Honor.

BRIEF PAUSE

MR. STEVERSON: Your Honor, I think Ms. Medders' report is already in the Court File, but we would just like to make a formal offer--offer her report as evidence in the case, as mandated by the Code of Alabama.

THE COURT: All right. It will be admitted.

[1418]STATE'S EXHIBIT 1 TO THIS HEARING MARKED AND ADMITTED INTO EVIDENCE HERE

MR. SOGOL: We would object to it, Your Honor, as it exists now. I think the attachment of the family recommendations is beyond the scope of what this report is supposed to be. It is supposed to be a report from the Probation Office, and not a compilation of letters and recommendations from the family. I think that that goes beyond what the report is supposed to be.

MR. FREEMAN: If The Court please, we would submit that this is a hearing which is not a jury hearing but rather a hearing before The Court. The Court determines.

THE COURT: I will be admitted, Mr. Freeman.

Appendix G

CROSS EXAMINATION

BY MR. SOGOL:

Q Ms. Medders, did you at any time talk with Mr. McWilliams about this case?

A No, sir, I never talked personally with Mr. McWilliams, as is noted in the report on page 7.

[1419]Q He was already gone from the Tuscaloosa County Jail by the time you were assigned the case, was he not?

A That's correct.

Q Did you make any effort to go down to Holman to talk to him?

A No, I did not.

Q The information about Mr. McWilliams comes from another source. Is that correct?

A Several sources.

Q I have no further questions of this witness.

MR. STEVERSON: Nothing further, Your Honor.

THE COURT: You may step down.

MR. FREEMAN: If The Court please, we would now at this time offer to resubmit all of the evidence that has been presented to The Court and received into evidence by The Court and all of the previous trial in this case, and all previous hearings.

THE COURT: Okay.

MR. FREEMAN: And with that, then, The State would have nothing further at this time.

[1420]THE COURT: All right. Does the Defense have anything, Mr. Sogol?

MR. SOGOL: Your Honor, we would request a continuance to allow us to go through the material that has been provided to us in the last 2 days, and to allow us to evaluate and assess whether there might be anything in that material which would lead to mitigating circumstance being established for The Court.

THE COURT: The material submitted by Taylor Hardin is, other than your copy, is in the Clerk's office, is it, Mr. Freeman?

MR. SOGOL: No, sir. That is the Clerk's. There is only one copy provided, Judge.

THE COURT: Well, I want that submitted to me, then, Mr. Sogol, and I am going to look over it.

MR. SOGOL: Would Your Honor want to make this a part of the record?

THE COURT: That will be fine.

MR. SOGOL: I point out to Your Honor, there are [1421]no test results in here; there are no test formats. Do you want to mark that Defense Exhibit 4, to this hearing, please, Paul?

DEFENSE EXHIBIT 4 MARKED FOR IDENTIFICATION

THE COURT: It will be admitted.

DEFENSE EXHIBIT 4 ADMITTED INTO EVIDENCE

MR. SOGOL: I point out to Your Honor- I have only skimmed through that portion of the material which is marked "3d Admission," but I have not had an opportunity to actually sit down and read it since it did not come to The Court until yesterday, in and of itself.

THE COURT: Well, I will give you an opportunity to read it, Mr. Sogol, together with The Court. Also, the material here that is given to The Court by Holman Prison that come in this morning, which I am also review. At that time, The Court will entertain any motion that you may have with some other person to review it. Otherwise, The Court will pronounce sentence at 2 o'clock.

MR. SOGOL: Today, Your Honor?

THE COURT: Today, yes.

[1422]MR. SOGOL: May I point out, Your Honor, it is 20 minutes to eleven, and that there is no way that I can go through this material - -

THE COURT: Well, I will give you the opportunity. Mr. Sogol. If you do not want to try, then you may not. Anything else?

MR. FREEMAN: Would we be able to make argument at 2 o'clock?

THE COURT: Yes, sir.

MR. FREEMAN: All right, sir.

THE COURT: We stand adjourned, then, until 2 o'clock this afternoon.

COURT IN RECESS UNTIL TIME STATED ABOVE

[1423]2:15 p.m., October 9, 1986

THE COURT: Let the record show, Mr. Smith, that since our recess, The Court has reviewed those records from Taylor Hardin that are pertinent here. That is Defense Exhibit 4, I believe, isn't it?

THE REPORTER: Yes, it is

THE COURT: The Court has also reviewed all the records from Holman which are in response to a subpoena and order of the Court, which The Court considers to a part of the record. Are you gentleman ready?

MR. FREEMAN: Yes, sir.

MR. BIVENS: Judge, If I could renew our motion for a continuance at this time, and try to clarify something for The Court, in renewing the Motion for a Continuance.

It is the position of the Defense that we have received these records at such a late date, such a late time that it has put us in a position as laymen, with regard to psychological matters, that we cannot adequately make a determination as what to present to The Court with regards to the particular deficiencies that [1424]the Defendant has. We believe that he has the type of diagnosed illness that we pointed out earlier for The Court and have mentioned for The Court. But we cannot determine ourselves from the records that we have received and the lack of receiving the test and the lack of our own expertise, whether or not such a condition exists; whether the reports and tests that have been run by Taylor Hardin, and the Lunacy Commission, and at Holman are tests that should be challenged in some type of way or the results should be challenged, we really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance.

THE COURT: Your motion is denied.

MR. BIVENS: All right. We do except.

MR. FREEMAN: Is Your Honor ready to proceed?

THE COURT: Yes.

CLOSING ARGUMENT

BY MR. FREEMAN:

[1425]First of all, I would like to express my apology to The Court for holding up this Court for a few minutes. I had another matter that was to me very important. And I apologize for the delay. If The Court please, of course, what we are looking at here has to do with mitigating or aggravating circumstances, as the jury did.

And we feel that we proved at least two: we proved murder robbery and murder during rape, and we feel that the evidence overcame the burden of proving mitigating circumstances by a preponderance of the evidence. We showed that the Defendant has prior convictions of robbery in the 1st degree, and rape in the 1st degree: felonies involving, in the words of the statute, the use or threat of violence to the person. This was a particularly heinous, atrocious, and cruel crime compared to others. He shot this victim so needlessly in order, I submit, to eliminate her as a witness because this crime was almost exactly as the other crime he had committed: It was a robbery and a rape, only this time he eliminated the witness.

Appendix G

He shot her as she was either falling down or had already fallen to the floor, evidencing particularly cruelty and a sadistic mental attitude; he raped and apparently immediately shot the victim in this case because of the manner, if Your Honor recalls, of the way she was dressed, the manner of her clothing; the facts and circum-[1426] stances in that bathroom where she was murdered; essentially no mitigating circumstances, we would submit, a total lack in this case on behalf of the Defendant; no evidence of any mitigating circumstances, in the words of the statute. I have looked at each and every one of them, I can't see where any of them apply. And in the weighing process, as a proper conclusion we submit there is only one conclusion in this case, and that is death as the jury recommended. And we recommend the death penalty in this case for this Defendant. We feel that if the death penalty was ever designed for any Defendant, it was designed for this Defendant, arising out of the facts and circumstances of this case.

Unfortunately it seems to be too easy for this Defendant. But of course, that is what the law provides. And when, if Your Honor sees fit to pronounce that sentence upon this Defendant, when the only thing the public can do to protect itself against men such as this killer has been done, when this man is dead, I hope that God will do whatever is appropriate in His eyes for this Defendant. Thank you very much.

THE COURT: Anything for the Defense?

Appendix G

MR. SOGOL: Your Honor, I would be pleased to respond to Mr. Freeman's remarks that there are no mitigating [1427]circumstances in this case if I were able to have time to produce have time to produce any mitigating circumstances.

I would simply point out to Your Honor something that you told me this morning: Neither one of us are doctors. Neither one of us are really capable of going through those records on our own and determining what was done or what Mr. McWilliams has or does not have, in the way of a mental disease or disorder; that both of those conditions are recognized as mitigating circumstances by the statute. I point out to Your Honor that there is an actual distortion between what some of the doctors have said at Taylor Hardin and what is reported in the Lunacy Commission report, with specific reference to Dr. Nagi's report. The Lunacy Commission Report says that they found that there was malingering. The Doctor's report specifically rules out malingering. It finds other things in the summary, from the Lunacy Commission alleging well-planned crime, and using words like that that are nowhere in the Doctor's report. And for whatever reason, it has been our contention and continues to be our contention that the simple use of the records from Taylor Hardin is insufficient to determine what happens out there, and what is going on, and what Mr. McWilliams' problems, if any, are. That is why we had continually asked for the specific tests themselves or the tests so that we can have people, our own people, evaluate them.

[1428]It just seems to me that there is nothing else that we can offer to The Court. In my opinion, The Court has foreclosed by structuring this hearing as it has, the Defendant from presenting any evidence of mitigation in psychological--psychiatric terms. And at that point, I have nothing else to say.

THE COURT: Anything else from you?

MR. FREEMAN: No, sir, nothing else.

THE COURT: Well, this Court has reviewed the records, and this Court finds apparent throughout all the records, the following quotes: "No evidence of psychosis; no psychosis; not psychotic; faking; feigning; seen as manipulative; et cetera."

MR. SOGOL: May I ask Your Honor a question?

THE COURT: I gave you, Mr. Sogol, the opportunity to examine them also, and you declined.

MR. SOGOL: No, sir. I would like an opportunity to reply to that, Your Honor.

THE COURT: All right.

[1429]MR. SOGOL: I told Your Honor that my looking at those records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me. Did I not tell Your Honor that?

THE COURT: As I said, on the record earlier, Mr. Sogol, and I don't want to argue or belabor this, but I would have given you the opportunity to make a motion to present someone to evaluate that.

MR. SOGOL: Your Honor gave me no time in which to do that. Your Honor told me to be here at 2 o'clock this afternoon. Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?

THE COURT: I want you to approach with your client, please.

THE DEFENDANT, JAMES EDMOND MCWILLIAMS, JR., AND HIS CO-COUNSEL, JOEL SOGOL, ESQUIRE, AND JOHN BIVENS, ESQUIRE, STOOD BEFORE THE BENCH HERE

THE COURT: Mr. McWilliams, on the 27th of August, 1986, you were found guilty of capital murder in this case. On the 28th day of August, 1986, the jury recom-[1430] mended that you be punished by death. Do you have anything to say why sentence should not be pronounced?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Go ahead.

THE DEFENDANT: Your Honor, I am sure, as you know, I filed a lawsuit against Taylor Hardin Facilities earlier in 1985. And as a part of that lawsuit, I filed a Motion to Produce, and in that Motion to Produce there were documents that the Federal Judge ordered Taylor Hardin to produce for me. In those documents, Your

Honor, I found discrepancies in the Lunacy Commission Report that was sent to This Court. I have just then been sent, since then, back to Taylor Hardin where I had opportunity to talk to Dr. Nagi. I confronted Dr. Nagi with these reports, and asked him specifically concerning the malingering, particularly concerning the mimicking, psychological disorder; I asked him about the overly dramatic acting, and other notations that were made in this 4-page report. Dr. Nagi said this was inconsistent with what he would testify to in this Court today. I told my attorneys about this. Mr. Sogol and Mr. Bivens have chosen not to call Dr. Nagi. I asked them to call Dr. Nagi so he could testify that that there were not his statements, but his name was being used to validate the [1431]statements, and the Dr. Poythress had misinterpreted what he meant. But Mr. Bivens and Mr. Sogol chose not to call him.

At this time, Your Honor, I can show you--I cannot speak for Dr. Nagi, but I can show you exactly in these 2 reports here where they are different, they are totally different. I can show Your Honor where Dr. Poythress has purposely misled This Court and being the Forensic Examiner Director, he purposely maliciously misled this Court into believing that there was nothing wrong with me.

In my lawsuit it alleges other things that he has said concerning these people. He knows the victim's family, and he purposely did this. And I can show this to This Court today, if Dr. Nagi were here, and he would testify to. I asked my attorneys to bring him; I cannot do any more than that. I can't make anyone to do anything. I am in jail. I have no telephone or nothing. So I have no other means. So, Your Honor, I just wanted to bring up that point and let

you know that at Taylor Hardin I do not receive an equal or let me think of another word to use- - I do not receive a just evaluation at Taylor Hardin, or from anyone that is employed there. That's all I have.

THE COURT: As punishment for this crime, Mr. [1432]McWilliams, This Court sentences you to death by electrocution in the manner and form provided by law.

This Court will draft a written order of findings as required by law.

THE DEFENDANT: Yes, sir.

THE COURT: Anything further?

NO FURTHER RESPONSE

MR. BIVENS: Your Honor, before we adjourn, we do want to give official notice of appeal.

THE COURT: That is automatic anyway, I'm sorry.

MR. BIVENS: And that would be in forma pauperis.

THE COURT: This Court stands adjourned.

COURT ADJOURNED

COMPLETION OF REPORTER'S
TRANSCRIPT ON APPEAL